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ARTICLES

MAKING SENSE OF METAPHORS: VISUALITY, AURALITY, AND THE RECONFIGURATION OF AMERICAN LEGAL DISCOURSE

*Bernard J. Hibbitts**

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INTRODUCTION: "AN EAR FOR AN EYE"[1]

While American legal discourse has embraced a range of figurative expressions evoking all sorts of sensory experience,[2] it has long favored visual metaphors. We frequently consider law as a matter of looking: we "observe" it; we evaluate claims "in the eye of the law";[3] our high courts "review" the decisions of inferior tribunals. Alternatively, we speak of law as something one would usually look at: it is a "body," a "text," a "structure," a "bulwark of freedom,"[4] a "seamless web,"[5] and even a "magic mirror."[6] We identify particular legal concepts with striking visual images: property rights are a "bundle of sticks";[7] a long-standing constitutional principle is a "fixed star";[8] a sequence of ownership is a "chain of title."[9] We associate legal reasoning with the manipulation of visible geometric forms: we try to "square" precedents with one another;[10] we repeatedly agonize over "where the line [between different doctrines and situations] can be drawn."[11] We discuss legality in terms of light and darkness: we search for "bright-line"[12] tests; we consider an area of concurrent jurisdiction to be a "zone of twilight";[13] we seek to extend constitutional protections by probing the shadowy "penumbras"[14] of well-known guarantees. With the aid of metaphor, we go so far as to give law the visual quality of hue: we may make a property claim under "color of title";[15] we discourage "yellow dog" contracts[16] and make securities trading subject to "blue sky" laws;[17] for good or ill, we frequently adhere to "black letter" rules.[18]

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[1] MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 130 (1964).

[2] *E.g.*, "free speech" (hearing); "hard cases" (touching); taking the "bitter with the sweet" (tasting, used by then Justice Rehnquist to describe a statutory limitation of a statutorily granted procedural right in Arnett v. Kennedy, 416 U.S. 134, 154 (1974)).

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[3] *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537, 559 (1896). For a more recent use of the phrase, see Herrera v. Collins, 113 S. Ct. 853, 860 (1993).

[4] For a discussion and critique of this metaphor for law, see MILNER S. BALL, LYING DOWN TOGETHER: LAW, METAPHOR AND THEOLOGY 23-27 (1985).

[5] *See, e.g.*, Beer v. United States, 425 U.S. 130, 148 n.4 (1975); Kenneth W. Starr, *The Seamless Web of State and Federal Law*, 26 S. TEX. L.J. 175 (1985).

[6] The "[l]aw, wherein, as in a magic mirror, we see reflected, not only our own lives, but the lives of all men that have been! When I think on this majestic theme, my eyes dazzle." OLIVER W. HOLMES, JR., *The Law*, *in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 20, 21 (Mark DeWolfe Howe ed., Harvard Univ. Press 1962) (1913). More recently, see KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY (1989).

[7] *See, e.g.*, Andrus v. Allard, 444 U.S. 51, 65-66 (1979). For an extended discussion of this metaphor, see Thomas Ross, *Metaphor and Paradox*, 23 GA. L. REV. 1053, 1055-63 (1989).

[8] *See, e.g.*, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[9] *See, e.g.*, Georgia v. South Carolina, 497 U.S. 376, 391 (1990).

[10] *See, e.g.*, General Box Co. v. United States, 351 U.S. 159, 169 (1955).

[11] *See, e.g.*, Schlesinger v. Wisconsin, 270 U.S. 230, 241 (1926). More recently, see Joseph L. Hoffman, *On the Perils of Line Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229 (1989).

[12] *See, e.g.*, Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1914 (1992); *see also* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984); *cf.* Cary v. Westinghouse Elec. Corp., 375 U.S. 261, 268 (1964) (referring to a "blurred line").

[13] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).

[14] *See generally* Burr Henly, *"Penumbra": The Roots of a Legal Metaphor*, 15 HASTINGS CONST. L.Q. 81 (1987).

[15] *See generally* Monica K. Kalo, *The Doctrine of Color of Title in North Carolina*, 13 N.C. CENT. L.J. 123 (1982).

This visual language has become far too well-entrenched and is far too convenient to be universally or summarily abandoned. In recent years, however, a noteworthy number of legal scholars (if not yet many judges or practitioners) have cast some of their best writing in aural metaphors. Most of these individuals subscribe to a broadly "critical" legal philosophy; many are exponents of distinctively feminist, African American, Hispanic, or Jewish approaches to jurisprudence. Their work characterizes law as a matter of "voice":[19] a figurative "speaking," and even, on occasion, a "singing"[20] in which institutions, groups, and individuals should all be articulate participants. Some voices are strong, some are weak, and some—generally those of the oppressed or the marginalized—must first be freed from the shackles of "silence."[21] Fairness demands "hearing" and carefully "listening" to all of these voices.[22] The new legal literature's metaphorical emphasis on the complementary exercises of speaking and listening simultaneously reflects and fosters a tendency to regard law, rights, legal reasoning, legal writing, legal language, legal doctrine, judicial review, constitutional federalism, the judicial process, and the attorney-client relation as so many forms of "rhetoric,"[23] "discourse,"[24] "storytelling,"[25] "talk,"[26] "dialogue,"[27] or "conversation."[28] Ultimately, the interplay of multiple voices in multiple settings is supposed to produce a legal pluralism that some have lyrically termed "polyphony."[29]

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[16] *See, e.g.*, NLRB v. Sevette, Inc., 377 U.S. 46, 48 n.2 (1964).

[17] *See, e.g.*, Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 308 n.4 (1988). *See generally* Jonathan R. Macey, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347 (1991).

[18] *See, e.g.*, Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 536 (1982); John A. Ellis, *Quasi-estoppel: Black-Letter Rule of Law in Family Law Cases*, 20 BEVERLY HILLS B. ASS'N J. 156 (1986).

[19] *See, e.g.*, Jerome M. Culp, Jr., *Voice, Perspective, Truth, and Justice: Race and the Mountain in the Legal Academy*, 38 LOY. L. REV. 61 (1992); Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990); Julius G. Getman, *Voices*, 66 TEX. L. REV. 577 (1988); Benita Ramsey, *Excluded Voices: Realities in Law and Law Reform*, 42 U. MIAMI L. REV. 1 (1987); Mark G. Yudof, *"Tea at the Palaz of Hoon": The Human Voice in Legal Rules*, 66 TEX. L. REV. 589 (1988).

[20] *See, e.g.*, Robert H. Abrams, *Sing Muse: Legal Scholarship for New Law Teachers*, 37 J. LEGAL EDUC. 1 (1987); Allan C. Hutchinson, *Democracy and Determinacy: An Essay on Legal Interpretation*, 43 U. MIAMI L. REV. 541, 542 (1989) (discussing "Law's Song"); Karl Johnson & Ann Scales, *An Absolutely, Positively True Story: Seven Reasons Why We Sing*, 16 N.M. L. REV. 433 (1986); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1861 (1987) (observing that "[l]egal language, like a song, can be hummed by someone who did not write it and chanted by those for whom it was not intended").

[21] For discussions of "silence" and "silencing," see Lucinda Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989); Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59.

[22] *See, e.g.*, Julius G. Getman & F. Ray Marshall, *Industrial Relations in Transition: The Paper Industry Example*, 102 YALE L.J. 1803, 1806 (1993); James M. O'Fallon & Cheyney C. Ryan, *Finding a Voice, Giving an Ear: Reflections of Masters/Slaves, Men/Women*, 24 GA. L. REV. 883 (1990); Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band-Aid—Contracts, Feminism, Dialogue and Norms*, 28 HOUS. L. REV. 791, 807, 813-14 (1991).

I believe that this jurisprudential turn from metaphoric visuality towards metaphoric aurality represents not a passing semantic fad, but a significant—if still nascent—reconfiguration of American legal discourse. The purpose of this Article is to analyze this reconfiguration and ultimately offer some explanations for it. In

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[23] *See, e.g.*, W. Cole Durham, *Rhetorical Resonance and Constitutional Vision*, 14 CARDOZO L. REV. 893 (1993); James B. White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985).

[24] *See, e.g.*, Eve Cary & Mary R. Falk, People v. Scott *&* People v. Keta: *"Democracy Begins in Conversation"*, 58 BROOK. L. REV. 1279 (1993) (state constitutional law as discourse); George P. Fletcher, *Law as Discourse*, 13 CARDOZO L. REV. 1631 (1992).

[25] *See, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Toni M. Massuro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099 (1989); Sandra C. McKenzie, *Storytelling: A Different Voice for Legal Scholarship*, 41 KAN. L. REV. 251 (1992); Richard K. Sherwin, *A Matter of Voice and Plot: Belief and Suspicion in Legal Storytelling*, 87 MICH. L. REV. 543 (1988).

[26] *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK (1991); Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 965 (1991) ("sovereignty-talk"); Paul A. LeBel, *Rights-Talk and Torts-Talk: A Commentary on the Road Not Taken in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 811 (1991); Steven D. Smith, *In Defense of Traditional Legal Scholarship: A Comment on Schlegel, Weisberg, and Dan-Cohen*, 63 U. COLO. L. REV. 627, 627 (1992) ("doctrine talk"); Joseph P. Tomain, *Contract Compensation in Nonmarket Transactions*, 46 U. PITT. L. REV. 867, 872 (1985) ("contracts talk").

[27] *See, e.g.*, Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 696-97 (1987-88) (attorney-client relation as dialogue); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048 (1977) (constitutional federalism as dialogue); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653 (1993); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 8-12 (1986) (judicial process as dialogue).

[28] *See, e.g.*, Teresa G. Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089, 1102 (1986) (law/legal writing as conversation); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 622 (1986) (rights as conversation); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 51 (1984) (legal reasoning as conversation).

[29] *See, e.g.*, Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2288-95 (1989); Elizabeth P. Hodges, *Writing in a Different Voice*, 66 TEX. L. REV. 629, 640 (1988); Carol Weisbrod, *Practical Polyphony: Theories of the State and Feminist Jurisprudence*, 24 GA. L. REV. 985 (1990).

Part I, I briefly establish the importance of these undertakings in light of the nature of metaphor and its central role in thought and legal reasoning. In Part II, I explore the cultural, sociological, and phenomenological roots of American jurists' traditional preference for visual legal metaphors. I show how visualist legal language has both reflected and reinforced three fundamental circumstances: first, Americans' long-standing cultural prejudice in favor of visual expression and experience; second, the legal and political power of certain gender, racial, ethnic, and religious groups which at least in the American context have demonstrated a particular respect for visuality; and third, the correspondence between traditional American legal values and the values supposedly supported by vision itself. In Part III, I investigate the multiple factors behind the growing vogue of aural metaphors in American legal discourse, especially among critical theorists seeking liberation from orthodox outlooks, elites, and values. I attribute the new figurative aurality to three factors: first, American culture's increasing interest in aural expression and experience; second, the novel and self-assured "turn towards experience" being taken by a growing number of legal scholars from previously marginalized gender, racial, ethnic, and religious groups which at least in the American context have demonstrated a particular respect for aurality; and third, the existence of a "fit" between the central tenets of critical jurisprudence and the supposed phenomenological biases of sound and hearing. In the Conclusion of the Article, I return to the theme of reconfiguration and consider the future of both aural and visual legal metaphors in American legal discourse.

I. METAPHORS IN LIFE AND LAW

> *Metaphors embody and configure both the abiding and the changing preoccupations of an age.*[30]

Metaphors explicitly or implicitly identify one phenomenon with another phenomenon from which the first is literally distinct. A game of chess may thus be characterized as a "battle" of wits; a leading citizen may be described as a "pillar" of the community. In each instance, the metaphor suggests an image[31] or experience that emphasizes a specific quality (here, competition or support) of its referent. Metaphors are generally offered to illuminate their referents' sense or significance; they are most useful and most successful in this respect when they associate an unfamiliar and/or abstract referent with something familiar and/or concrete. At the same time, the very specificity, familiarity, and tangibility that may recommend a metaphor may incidentally enable it to obscure and distort. Calling chess a battle distracts attention from the cooperative aspects of that game; calling a leading citizen a pillar of the community hides the benefits she derives from leadership. Paradoxically, the better a metaphor is, the worse this kind of problem threatens to become. In extreme circumstances, a good metaphor may be so compelling that it altogether subverts its referent's original meaning. No longer recognized as a metaphor, it redefines truth on its own limited terms.[32]

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[30] BARBARA M. STAFFORD, BODY CRITICISM: IMAGING THE UNSEEN IN ENLIGHTENMENT ART AND MEDICINE 465 (1993).

[31] The frequent association of metaphor with image has led some commentators to suggest that all metaphors are necessarily visual. Most modern scholars nonetheless believe that metaphors can theoretically appeal to any (or any combination) of the senses, thereby allowing for the possibility of the "aural metaphors" discussed in this Article. *See,*

Metaphors appear in virtually all branches of discourse. Assuming metaphors to be products of the imagination, conventional wisdom has traditionally identified them with the arts of poetry and literature. Many metaphors certainly appear in these contexts, but metaphors can also be found in other more overtly analytic realms. Historians routinely call a portion of the early medieval period the "Dark Ages." There was, of course, no more darkness in the "Dark Ages" than in any other time, before or since; the term "Dark" is a metaphor designed to suggest ignorance and barbarism. Scientists similarly speak of super-dense collapsed stars as "black holes." But "black holes" are not really holes; the term "hole" is a metaphor chosen to communicate the fact that neither matter nor light can escape the gravitational pull of these bodies.

A string of recent articles and books has stressed that metaphors are commonplace in law.[33] The multiple visual and aural metaphors with which I began this Article help to create and sustain what has imaginatively been described as "a magical world . . . where liens float, corporations reside, minds hold meetings, and

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e.g., I.A. RICHARDS, PRINCIPLES OF LITERARY CRITICISM 119 (1925); PAUL RICOEUR, THE RULE OF METAPHOR 207-15 (Robert Czerny trans., Univ. of Toronto Press 1977) (1975).

[32] *See generally* Douglass Berggren, *The Use and Abuse of Metaphor, I*, 16 REV. METAPHYSICS 237, 244-45 (1962).

[33] *See, e.g.*, BALL, *supra* note 4; HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS (1992); ALEXANDER E. SILVERMAN, MIND, MACHINE AND METAPHOR: AN ESSAY ON ARTIFICIAL INTELLIGENCE AND LEGAL REASONING (1993); Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395 (1986); Gary Minda, *The Law and Metaphor of Boycott*, 41 BUFF. L. REV. 807 (1993); James E. Murray, *Understanding Law as Metaphor*, 34 J. LEGAL EDUC. 714 (1984); Ross, *supra* note 7; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988).

promises run with the land."[34] To say that jurisprudential metaphors exist and even flourish is not, however, to say that they have been uniformly welcomed, even by the most creative lawyers and jurists. In the eighteenth century, England's Lord Mansfield commented that "nothing in law is so apt to mislead than a metaphor."[35] In the early years of this century, Yale legal theorist Wesley Hohfeld agreed.[36] In 1926, Benjamin Cardozo was willing to tolerate metaphors in law, but held that they had "to be narrowly watched, for starting out as devices to liberate thought, they end often by enslaving it."[37]

As we have come to appreciate that metaphor is omnipresent, we have come to take it very seriously.[38] Today, few would dismiss it as mere semantic decoration, ornament, or rhetorical device. Some scholars have indeed gone so far in the other direction as to suggest that metaphors are fundamental tools of thought and reasoning—so much a part of the deep structure of our mentality that "our ordinary conceptual system . . . is . . . metaphorical in nature."[39]

As an aspect of our mentality's deep structure, our metaphors can reveal a great deal about us, both as individuals and as members of a broader culture. I may use a certain metaphor because I am, or at least my culture is, familiar with the metaphor's subject matter. Coming readily to my mind as a pole of comparison, the metaphor will be meaningful to others sharing similar life experiences or backgrounds. For example, using the metaphoric expression "I struck out" to communicate failure suggests a personal and/or cultural familiarity with baseball. Alternatively, I may use a particular metaphor because I and/or my society value or devalue its subject; using the metaphor can therefore accentuate positive or negative reaction to the metaphor's referent. For instance, were I a libertarian, or were I living in a libertarian culture, I might label government a "parasite." My choice of metaphor would not only communicate my dislike of government, but, by association, my dislike of parasites as well.

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[34] Ross, *supra* note 7, at 1053.

[35] *Quoted in id.* at 1057 n.9.

[36] *Id.*

[37] Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926). For a similar comment by Justice Frankfurter, see Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54, 68 (1943).

[38] *See, e.g.*, Gerald W. Casenave, *Taking Metaphor Seriously: The Implications of the Cognitive Significance of Metaphor for Theories of Language*, 17 S.J. PHIL. 19 (1979).

[39] GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 3 (1980).

"Modal" metaphors of the sort examined in this Article can be particularly revealing of our circumstances and values. Modal metaphors directly or indirectly evoke specific modes or forms of human sensory experience: sight, sound, touch, smell, or taste. For example, if I call an attitude an "outlook," I am using a modal metaphor referring to a visual experience. Alternatively, if I refer to the "texture" of an argument, I am using a modal metaphor referring to a tactile experience. Over time, individuals may develop or demonstrate a penchant for modal metaphors favoring a particular sense. Far from being arbitrary, such a penchant may (as we shall see) reflect a broad cultural bias for that sense, an association with a group which in a specific historical or social context has indulged or has been forced to privilege that sense, and/or an inclination towards values which that sense has been deemed to phenomenologically support or promote.

Ironically, we may reveal more of ourselves by our general and our modal metaphors than by statements and sayings that are the products of more calculated deliberation. Insofar as metaphors are privy to our most profound thoughts and experiences, they may tap into cultural or personal truths of which we are not at first aware, and into notions of which we may not even approve. Calling a mental crisis a nervous "breakdown" may unwittingly manifest a modern tendency to regard the mind as a machine;[40] calling an African American football player "a little monkey" may unwittingly manifest racism.[41] In this context, metaphors operate as the "sonar" of our minds, revealing deeply submerged—but nonetheless fundamental—realities that we cannot or will not consciously acknowledge.

As an integral part of our mentality, metaphors can also shape our thoughts and even our actions.[42] Calling chess a battle (or hearing someone else call it a battle) certainly encourages me to conceive of it, however inaccurately, as a harsh, even potentially violent confrontation between grim-faced opponents. The psychological impact of the metaphor may be all the more powerful if I have had little or no previous experience with the game. The way I think about chess may in turn affect my behavior. In light of the metaphor, maybe I will decide to play, or maybe I will choose to do something less aggressive. If I do choose to play, the metaphor I used or heard might well influence how I play. For instance, if chess is a battle, an intimidating, combative strategy may seem appropriate. If the "battle" metaphor becomes popular, an entire culture may be led to the same conclusion, and play chess accordingly.

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[40] *Id.* at 27-28.

[41] This unfortunate label recalls an "unintentional" but highly controversial "Freudian slip" made by noted TV sportscaster and inveterate metaphor-monger (-mangler?) Howard Cosell in 1983. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339 (1987).

[42] BALL, *supra* note 4, at 6; LAKOFF & JOHNSON, *supra* note 39, at 4-5.

Modal metaphors can have an especially strong impact on how we think and what we do. If, for example, I call "thought" itself "reflection," I am figuratively characterizing thought as a visual enterprise. Insofar as reflection literally presumes a visual subject, the metaphor may subtly encourage thinkers to believe that they should look for intellectual stimulation, rather than listen for it; in other words, the metaphor may affect their epistemological orientation. The same visual metaphor may alternatively imply that only individuals from visually biased backgrounds can properly engage in thought, prompting individuals from other traditions that prize other senses to be dismissed (or not to regard themselves) as legitimate or competent participants in intellectual inquiry. In this context, the "casual" choice of a "simple" metaphor may have profoundly divisive social implications. Describing thought as "reflection" may even induce thinkers to behave in a manner considered appropriate to a visual process: for example, the metaphor may suggest that thinkers should passively watch the world, rather than become actively engaged with it.

Regardless of whether metaphors are considered as consequences or causes, the partial or total displacement of one metaphor by another is a significant cultural event. As a general matter, such displacement may reflect the development of new conditions or values, some of which may not, as yet, have risen above the horizon of awareness. Alternatively, or even additionally, displacement may help bring about new conditions or values. In law, a shift in metaphor may indicate or promote a new doctrine or even a new jurisprudential theory that cannot easily be brought into the fold of existing figures of speech. The reconfiguration of American legal discourse that is the topic of this Article is, however, even more fundamental than this, for it involves the partial displacement of one entire family of modal metaphors (indirectly appealing to the eye) by another (indirectly relating to the ear). If the preceding overview of the cognitive, cultural, and behavioral significance of metaphors in general—and modal metaphors in particular—is accurate, such a sensory shift would seem both to reflect and portend major paradigmatic changes in American law and society.[43] For this reason, it is well worth exploring.

II. "MIRRORS OF JUSTICE": VISUALITY AND LEGAL DISCOURSE

> *As our age translates itself back into the oral and auditory modes . . . we become sharply aware of the uncritical acceptance of visual metaphors and models by many past centuries.*[44]

Understanding the contemporary shift away from visual towards more aural legal metaphors requires an initial explanation of our traditional preference for visually oriented legal language. In this part of the Article, I suggest that this preference is a product of three overlapping factors: first, a longstanding American cultural bias towards visual expression and experience that is arguably based on the social prominence of the written word; second, the traditional numeric and political domination of American law and legal literature by members of gender, racial, ethnic, and religious groups which through their special command, control, or endorsement of writing have in the course of American history developed and/or demonstrated a particular respect for visuality; and, third, the accord that exists between orthodox American legal values and the values we have come to associate with vision as a phenomenon. In the pages that follow, I will consider each of these factors in turn.

A. *Seeing Culture*

In Part I of this Article I argued that metaphors can reflect the circumstances and attitudes of the society that generates them. In light of this point, it seems reasonable to suggest that the traditional popularity of visual metaphors in American legal language has much to do with the bias towards visual expression and experience that has traditionally characterized American culture and, inevitably, American law.

The traditional American bias towards the visual is aptly captured by the observation that "[i]n our society, . . . to be real, a thing must be visible."[45] We[46] demonstrate our visual bias in numerous ways and in numerous contexts, usually without recognizing that such a bias even exists. Every time we sing the first line of the national anthem, we ask a question about looking: "Oh say can you *see* . . . ?" We pay for goods and services with dollar bills that bear a staring eye on their backs.[47] We go on vacation not to hear the sounds, but to "see the sights"; we take along cameras, not tape recorders.[48]

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[43] To this point, the only work of legal scholarship to have given even passing consideration to the implications of choosing one scheme of modal metaphors over another is O'Fallon & Ryan, *supra* note 22, at 896-97. The authors of that piece notably recommend that the prevailing metaphorical model of "seeing" be replaced by one of "listening."

[44] MARSHALL MCLUHAN, THE GUTENBERG GALAXY 72 (1962).

[45] Edmund Carpenter & Marshall McLuhan, *Acoustic Space*, *in* EXPLORATIONS IN COMMUNICATION 65, 65 (Edmund Carpenter & Marshall McLuhan eds., 1960). McLuhan once noted that to question this proposition "is to undermine the American way of life."

We give aesthetic priority to visual effect. Our glass and steel buildings are monuments to the power of sight, rather than sound or touch.[49] Our idea of personal beauty is primarily visual.[50] So is our idea of art, to the point where, in ordinary discourse, that term denotes purely visual painting, not music or dance.[51] Our visual orientation even colors our approach to art forms which, at least in theory, are not altogether dependent on visual appreciation: we regularly highlight the visuality of sculpture—and, at the same time, neutralize its tactility—by posting signs in our museums and art galleries that read "Do Not Touch." Is it any wonder that in such a context, our sculpture should have become "painterly,"[52] i.e., designed much more for seeing than feeling?

Less obviously, but more fundamentally, our visuality shapes our sense of social identity and difference. We tend to group one

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Letter from Marshall McLuhan to Maurice Stein (May 15, 1964), *in* LETTERS OF MARSHALL MCLUHAN 299, 300 (Matie Molinaro et al. eds., 1987).

[46] As the next section of this Article will demonstrate, some Americans tend to be more visually biased than others. The term "we" may nonetheless be used in this context insofar as all Americans, regardless of their specific identities or affiliations, work and live within a national social and political structure that has encouraged or required them (at least for limited purposes) to adopt a significant number of visualist habits.

[47] For a brief discussion of this eye and its symbolic significance, see E.H. Gombrich, *The Visual Image*, *in* MEDIA AND SYMBOLS: THE FORMS OF EXPRESSION, COMMUNICATION AND EDUCATION 241, 261 (David R. Olson ed., 1974).

[48] On the pervasive visuality of modern tourist experience, see SUSAN SONTAG, ON PHOTOGRAPHY 9-10 (1977); Kenneth Little, *On Safari: The Visual Politics of a Tourist Representation*, *in* THE VARIETIES OF SENSORY EXPERIENCE: A SOURCE BOOK IN THE ANTHROPOLOGY OF THE SENSES 148 (David Howes ed., 1991) [hereinafter VARIETIES].

[49]
> A lean skyscraper, its glass-sheathed walls reflecting the tinted clouds of twilight, is beautiful to behold from the outside. . . . But the senses other than sight tend to be underfed. The place has neither odor nor sound other than the muted noises of office work or of soft canned music; and it discourages touch.

YI-FU TUAN, SEGMENTED WORLDS AND SELF: GROUP LIFE AND INDIVIDUAL CONSCIOUSNESS 114 (1982).

[50] ANTHONY SYNNOTT, *Beauty and the Face: Truth and Goodness, Mirrors and Masks*, *in* THE BODY SOCIAL: SYMBOLISM, SELF AND SOCIETY 73 (1993).

[51] ARNOLD BERLEANT, ART AND ENGAGEMENT 53 (1991).

[52] *See* ROBERT GOLDWATER, PRIMITIVISM IN MODERN ART 35 (1986); *see also* CLEMENT GREENBERG, ART AND CULTURE: CRITICAL ESSAYS 142 (1961) ("Under the modernist 'reduction,' sculpture has turned out to be almost as exclusively visual in its essence as painting itself.").

another more on the basis of similar visual appearance than on, say, similar accent.[53] This is most obvious when we categorize individuals according to the color of their skin: in our visualist culture, most Americans are "white" or "black." Visual identity has indeed become so important to us that we not only differentiate, but actually discriminate against one another on a visual basis. Having skin of a certain color may in practice entitle us to, or alternatively, it may disqualify us from educational opportunity, economic wealth, and political power.

In light of our cultural preoccupation with the visual, it is not at all surprising that we are far more concerned with personal deficiencies in our sense of sight than with deficiencies in our other sensory departments. We insist on wearing glasses or contact lenses to correct minor flaws in our vision while we would not think of, say, wearing a hearing aid to correct similar minor defects in our hearing.[54] We fear losing our sight more than we fear losing any of our other faculties.[55] We harbor great pity for the blind, while deaf persons often arouse our irritation and impatience.[56]

Visuality penetrates our very language. We routinely rely on visual metaphors to communicate understanding and knowing, or phenomena understood and known.[57] When we comprehend something, we say "I see." Someone who does not understand "can't see" what we mean; he or she may even be "blind" to the obvious. We describe good leaders in metaphorical terms that suggest that they see far or well: they are "visionary"; they have "insight" or "foresight"; they have "perspective" or a "world view." We also associate knowledge and understanding with light, the physical presence of which is necessary for seeing. If I want someone to explain a topic, I might ask them to "illuminate" it or "shed light" on it. In the same vein, smart people are "bright." Darkness, on the other hand, inhibits seeing and therefore denotes ignorance. If I don't know what's going on, I'm "in the dark." As a general matter, not-so-smart people are "dimwits."

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[53] *See generally* James Jones, *The Concept of Racism and Its Changing Reality*, *in* IMPACTS OF RACISM ON WHITE AMERICANS 27, 40 (Benjamin Bowser ed., 1981) ("Western society has had a tendency to categorize human groups according to simple visible traits and to infer mental, behavioral, and sociocultural capacities and tendencies from them.")

[54] In part because it is less necessary in a visualist society; wearing a hearing aid carries a significant stigma. JILLYN SMITH, SENSES AND SENSIBILITIES 45 (1989).

[55] Anthony Synnott, *The Eye and I: A Sociology of Sight*, 5 INT'L J. POL. CULTURE & SOC. 617, 618 (1992).

[56] HECTOR CHEVIGNY & SYDELL BRAVERMAN, THE ADJUSTMENT OF THE BLIND 151 (1950).

[57] *See generally* WALTER ONG, *"I See What You Say": Sense Analogues for Intellect*, *in* INTERFACES OF THE WORD: STUDIES IN THE EVOLUTION OF CONSCIOUSNESS AND CULTURE 121 (1977); Marcel Danesi, *Thinking Is Seeing: Visual Metaphors and the Nature of Abstract Thought*, 80 SEMIOTICA 221 (1990); Alan Dundes, *Seeing Is Believing*, NAT. HIST., May 1972, at 8; Gordon G. Gallup & Patricia A. Cameron, *Modality Specific Metaphors: Is Our Mental Machinery "Colored" by a Visual Bias?*, 7 METAPHOR & SYMBOLIC ACTIVITY 93 (1992); Stephen A. Tyler, *The Vision Quest in the West, or What the Mind's Eye Sees*, 40 J. ANTHROPOLOGICAL RES. 23 (1984).

American law has both reflected and actively contributed to our overall cultural visuality. Even in American trial courts which have resounded with the voices of lawyers, litigants, judges, and jurors, seeing has traditionally been given priority over the other senses.[58] Great effort has gone into making testimony and arguments visible in writing. Eyewitnesses testifying to what they have seen have been preferred over "earwitnesses" testifying to what they have heard.[59] Frequently, earwitnesses have been barred as bearers of inadmissible hearsay.[60] Our judges and juries have generally given greater weight to visual evidence (in the form of both writings and exhibits) than to oral evidence.[61] The existence of some visible written instrument has traditionally precluded oral testimony as to that instrument's meaning (the parol evidence rule). On appeal, disputed cases have come before appellate judges who have been expressly tasked with resolving them in writing. The appellate process still requires these judges to read visible briefs, precedents, and statutes rather than listen to live witnesses or (given severe time limits on oral argument) even attorneys.[62]

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[58] "The strategic organizing principle of the courtroom is a didactic one. It is that of the visibility of justice rather than of its audibility." Peter Goodrich, *Attending the Hearing: Listening in Legal Settings*, *in* RECEPTION AND RESPONSE: HEARER CREATIVITY AND THE ANALYSIS OF SPOKEN AND WRITTEN TEXTS 11, 18-19 (Graham McGregor ed., 1990).

[59] "Earwitness testimony, in contrast to eyewitness testimony, has not received a great amount of attention from . . . the courts, possibly because of the greater reliance on information processed visually rather than orally." A. Daniel Yarmey, *Earwitness Evidence: Memory for a Perpetrator's Voice*, *in* ADULT EYEWITNESS TESTIMONY: CURRENT TRENDS AND DEVELOPMENTS 101, 101 (David F. Ross et al. eds., 1994).

[60] Of course, the hearsay rule is formally premised on a presumption that has little to do with visuality or aurality: that an out-of-court statement should not be taken as evidence of the truth asserted in the statement if its maker is not available for in-court cross-examination. Thus construed, the hearsay rule can preclude the admissibility of a witness's testimony as to what the witness has seen, read, or heard. In practice, however, the rule tends to apply most frequently and forcefully against reports of third-party speech. In that context, it may reflect the distinctly visualist concern that speech *per se* is a casual phenomenon having limited probative value outside of very specific circumstances—thus, the exception of the "dying declaration."

[61] One evidence expert has called this indulgence of the visual

> the "wax museum" effect. People are fascinated by the real thing. The bullets that were found lodged in the victim's heart, the actual handwritten memorandum that was used to seal the agreement, the remains of the automobile gas tank that ruptured on impact burning the occupants of the car.
>
> . . . .
>
> . . . Until we see something tangible, [the event] is something that did not happen, or at least did not happen to real people . . . .

ASHLEY S. LIPSON, ART OF ADVOCACY: DEMONSTRATIVE EVIDENCE § 2.02 (1994).

In part because our judicial process has been so skewed towards visuality, American courts and legislators have traditionally shown particular sensitivity to visible declarations, visible claims, and visible injury. Written deeds, wills, and contracts have been readily and literally enforced;[63] unwritten, such "instruments" have tended to be void or at least problematic. Judicial recognition of property rights has often depended on whether property-claimants have visibly manifested their claims by formal registration or, adversely, by "open and notorious" possession.[64] Under the doctrine of "substantial interference," nuisance plaintiffs demonstrating visible harm from soot, smoke, or other pollutants have usually been better off than those complaining about noise or odor.[65] In negligence law, visible injury has historically been more compensable than less visible, often invisible emotional distress.[66] In defamation law, visible libel has been taken far more seriously than oral slander.[67] In civil rights law, "visible minorities" have received more attention and protection[68] than have other subjugated groups (such as the deaf)[69] whose identities have been less visually defined.

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[62] ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS 109 (1990).

[63] On the traditional literalism of American wills law in particular, see Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 224-26 (1988).

[64] CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 269 (1994).

[65] This tendency accords with our primarily visual understanding of pollution itself.

> Findings suggest that the strongest physical stimuli influencing awareness of air pollution are particulates, soiling of buildings and household objects by dustfall, and reduced visibility caused by haze. Awareness of air pollution obviously depends heavily upon visual perception. This finding takes on particular significance because many toxic gaseous pollutants cannot be seen.

Gary W. Evans & Stephen V. Jacobs, *Air Pollution and Human Behaviour*, *in* ENVIRONMENTAL STRESS 105, 111 (Gary W. Evans ed., 1982).

[66] *See* Peter A. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333, 336-40 (1984); Martha Chamallas & Linda K. Kerber, *Women, Mothers and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990).

[67] NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 27-28 (1986).

[68] Marshall McLuhan recognized the relationship in our society between visuality and remedy in the early 1960s: "Especially the child, the cripple, the woman and colored person appear in a world of visual . . . technology as victims of injustice." MCLUHAN, *supra* note 1, at 31.

[69] Advocates of "deaf rights" have repeatedly commented on the problems associated with bearing an "invisible" disability in a visualist environment. For example,

> [t]he person with a speech, language or hearing disorder is entitled to the same legal rights and consideration that the disabled person with a more visible impairment receives. The paralytic person in a wheelchair, the amputee on

American legal scholarship has similarly assumed a strongly visualist cast. American legal scholars have traditionally preferred to study written appellate decisions rather than the oral arguments of lawyers or the oral charges of trial judges. Visibility of effort has become a critical scholarly standard for members of the American legal professoriate; for tenure and promotion purposes, what matters most is what, how much, and how well one writes on the visible page ("scholarship"), rather than what, how much, or how well one speaks into thin air ("teaching"). Scholarly convention has moreover tended to suppress even the written semblance of aurality. For example, most American law books and articles take the forms of analysis and essay. Both of these expository styles may be characterized as narrowly "visual" insofar as they are, for a variety of structural and mnemonic reasons, virtually unknown in oral experience. Until very recently, alternative forms such as story, parable, poem, and lyric which have powerful aural antecedents,[70] and which even in writing are strongly evocative of aural expression,[71] have been either eschewed in legal literature or published only for the dismissive purposes of entertainment and parody.[72] In some instances, American legal scholars have gone so far towards visuality as to introduce semiverbal or nonverbal diagrams and graphs into their works.[73]

> crutches, the blind man or woman with a white cane immediately trigger concerns about possible violation of the rights of the handicapped. But when someone appears able-bodied and clear-eyed, questions of inaccessibility to buildings and discrimination in education do not always appear so pressing.

Russell J. Love, *Breaking the Sound Barrier*, HUM. RTS., Spring 1980, at 27, 27.

[70] *See generally* H. MUNRO CHADWICK & N. KERSHAW CHADWICK, THE GROWTH OF LITERATURE (1936); RUTH FINNEGAN, ORAL POETRY: ITS NATURE, SIGNIFICANCE AND SOCIAL CONTEXT (2d ed. 1992); ALBERT B. LORD, EPIC SINGERS AND ORAL TRADITION (1991); ISIDORE OKPEWHO, AFRICAN ORAL LITERATURE (1992).

[71] For instance, "[i]n a good story, we can almost hear the voice. It's as if, reading and assimilating the qualities of a voice's language, we're translating the written word into the spoken one, using our eyes to listen . . . ." LOOK WHO'S TALKING: AN ANTHOLOGY OF VOICES IN THE MODERN AMERICAN SHORT STORY at xxi (Bruce Weber ed., 1986). Likewise, poetry has been described as "still bound to the oral tradition of sound more than sight, even though our access is most often through the eye than the ear." BERLEANT, *supra* note 51, at 151.

[72] *See, e.g.*, J. GREENBAG CROKE, LYRICS OF THE LAW (San Francisco, Sumner Whitney 1884); LANGDELL LYRICS OF 1938 (W. Barton Leach ed., 1938). See also the various verses penned by such legal luminaries as Karl Llewellyn and Fred Rodell, reproduced in THE JUDICIAL HUMORIST (William L. Prosser ed., 1952). The best survey and discussion of modern light legal verse as a genre is J. Wesley Miller, *Legal Poetry*, *in* THE LAWYER'S ALCOVE: POEMS BY THE LAWYER, FOR THE LAWYER, AND ABOUT THE LAWYER at i (Ina R. Warren ed., 1990).

[73] *See, e.g.*, James D. Gordon III, *Teaching Parol Evidence*, 1990 B.Y.U. L. REV. 647, 650-51 (flow charts); John P. Heinz & Edward O. Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111, 1130 (1978)

In this context, it is hardly surprising that American jurists have relied heavily on visual metaphors when describing legal concepts and relations. In a cultural environment which has favored seeing, such figures of legal speech have been semantically convenient. Beyond mere convenience, however, visual legal metaphors have arguably helped to make American law familiar and legitimate. A law expressed in visual terms is psychologically more accessible to members of a visually biased society than a law expressed in aural or tactile metaphors (consider, for instance, the relative inaccessibility of a judicial "refeel," as opposed to a judicial "review"). A visually phrased law is more experientially recognizable, and hence easier to follow. It is more acceptable and less oppressively alien. It is more likely to be regarded as being *of* the people, not just *for* the people.

But if American legal discourse has traditionally favored visual metaphors in part because American culture has been biased towards visual expression and experience, one naturally wonders why American culture has been so visualist. It might immediately be suggested that our visuality is the predictable product of our society's fascination—even obsession—with the images we constantly encounter in photographs, movies, and television.[74] Certainly our embrace of images has contributed to our visuality. There are, however, two problems with the "imagism" hypothesis, standing alone. First, our visuality, historically considered, predates America's relatively recent turn toward images. Second, if imagism were at the root of our predisposition towards the visual, one would think that in the age of TV (not to mention MTV) the visual legal metaphors which are supposedly visuality's by-product would be enjoying an increasing vogue instead of losing ground to aural figures of speech. In the context of both these points, I would like to pursue a less obvious, but I believe ultimately more rewarding line of argument and propose that the visuality that informs and supports our visual legal metaphors is primarily a

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("multidimensional scalogram"); Jacob Rabkin & Mark H. Johnson, *The Partnership Under the Federal Tax Laws*, 55 HARV. L. REV. 910, 910a (1942) (chart); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 347 (1949) (Venn diagrams); Laurens Walker et al., *Order of Presentation at Trial*, 82 YALE L.J. 216, 220 (1972) (graph).

[74] *See generally* DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA (1961); STUART EWEN, ALL CONSUMING IMAGES: THE POLITICS OF STYLE IN CONTEMPORARY CULTURE (1988).

product of our culture's profound dependence on the written word.[75]

This proposal is admittedly counterintuitive. We tend to think of the written word as "verbal," not "visual" (i.e., as language rather than image). This dichotomy is trenchant and often helpful, but it can be overstated. Certainly the written word is verbal, but in critical respects it is a visual medium as well.[76] To appreciate it or to manipulate it (braille aside), we need to see it.[77] As a society puts more of its essential information in written form, its members become more focused on the visual sense which enables them to retrieve that information by reading.[78] Even for those who cannot read, the visual surface becomes a primary source of meaning as writers recognize that pictures are the most convenient permanent substitutes for written words. For readers and nonreaders alike, seeing becomes knowing. Because the visual understanding of texts or images does not necessarily require a viewer to hear, touch, smell, or taste, those senses may moreover become secondary to seeing as cultural and individual resources. When a society becomes sufficiently saturated with writings and other visual materials, its members may even feel that they can afford to deprecate or condemn the other senses as culturally superfluous capacities.

The intimate connection between writing and visuality has been indirectly and directly demonstrated at numerous junctures in Western cultural and legal history. Members of societies having little or no experience with writing have tended to value a variety of senses.[79] They may not have held all in equal esteem, but relative to contemporary America, their members have generally placed less emphasis on sight and more emphasis on sound.[80] On the other hand, members of societies having more experience with writing have given increased weight to visuality and visual experience.[81]

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[75] This hypothesis is not entirely new. Although unfamiliar to most legal scholars, it has been advanced by such noted communications theorists as Walter Ong and Marshall McLuhan, although neither man ever articulated or analyzed it fully. *See, e.g.*, WALTER J. ONG, THE PRESENCE OF THE WORD: SOME PROLEGOMENA FOR CULTURAL AND RELIGIOUS HISTORY 8 (1967) (noting that "[w]riting . . . shifts the balance of the senses away from the aural to the visual"). Most recently, see Robert D. Romanyshyn, *The Despotic Eye and Its Shadow*, *in* MODERNITY AND THE HEGEMONY OF VISION 339, 340 (David M. Levin ed., 1993) [hereinafter MODERNITY] (noting that "the ocularcentrism of modernity, the hegemony of vision, the installation of the reign of the despotic eye, is also a verbocentrism, the consciousness of the book").

[76] "[T]he word is never simply a word but is always also an image." MARK C. TAYLOR & ESA SAARINEN, IMAGOLOGIES: MEDIA PHILOSOPHY 27 (1994). *See generally* Richard Shusterman, *Aesthetic Blindness to Textual Visuality*, 41 J. AESTHETICS & ART CRITICISM 87 (1982).

[77] This is so even if, as in some societies, reading and writing also involve speaking and listening. *See infra* notes 84, 98, 134 and accompanying text.

[78] JAMES CURTIS, CULTURE AS POLYPHONY: AN ESSAY ON THE NATURE OF PARADIGMS 99 (1978).

Take, for instance, the marginally literate society of pre-Hellenistic Greece.[82] Its centerpieces were great oral epics (the *Iliad* and the *Odyssey*) which continued to be performed long after they were written down around 700 B.C.[83] The relatively few Greek texts that existed were almost always regarded as records of speech that needed to be read aloud.[84] Greek philosophers down to the time of Plato were not writers as much as they were talkers. While not unfamiliar with visual metaphors for thought,[85] they also considered that as a "dialogue carried on by the mind with itself";[86] they repeatedly expressed the idea of "knowing" in terms of "hearing" and "listening."[87] Plato's own *Dialogues* were a literary extension of his discipline's actual and figurative aurality.[88] Early Greek scientists conceived of the universe as having an aural as well as a visual presence: Pythagoras became famous for speculating on the "music of the spheres."[89] Taking their cue from myth, Greeks from all walks of life routinely associated silence and muteness with desolation and death.[90] Reflecting the prevailing cultural circumstances, early Greek law depended heavily on ceremonies and ritual procedures that implicated the ear, the hand, and the mouth, as well as the eye.[91] The classical Greek word for law, *nomos*, was itself derived from the verb *nemein*, meaning "to recite" or "to read aloud."[92] In this context, it should not be surprising that Greek law was long understood as having intimate ties to oral poetry,[93] and, via an alternative rendering of *nomos* as "tune," even

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[79] *See generally* Bernard J. Hibbitts, *"Coming to Our Senses": Communication and Legal Expression in Performance Cultures*, 41 EMORY L.J. 873 (1992).

[80] This is not to imply that any one culture or group ever exceeds any other in its members' ability to see, hear, feel, etc. It is merely to suggest that the attention and respect accorded to the various sensory channels is not physiologically or psychologically fixed in humans, but rather is contingent on historical and social circumstances. For elaborations of this root hypothesis, which is now accepted by a variety of historians, sociologists, and anthropologists, see CONSTANCE CLASSEN, WORLDS OF SENSE: EXPLORING THE SENSES IN HISTORY AND ACROSS CULTURES (1993); DONALD M. LOWE, HISTORY OF BOURGEOIS PERCEPTION (1982); MCLUHAN, *supra* note 1; ONG, *supra* note 75; VARIETIES, *supra* note 48.

[81] Visuality may consequently "be taken as a symptomatology of the history of thought. The use and often metaphorical development of vision becomes a variable which can be traced through various periods and high points of intellectual history . . . ." DON IHDE, LISTENING AND VOICE: A PHENOMENOLOGY OF SOUND 6 (1976).

[82] Although the extent of literacy in pre-Hellenistic Greece has historically been the subject of protracted and even heated debate, it now appears to have been quite low. One recent estimate has placed the level of literacy in fifth century B.C. Attica (the region which included Athens) at between 5% and 10% of the total population. WILLIAM V. HARRIS, ANCIENT LITERACY 114 (1989).

[83] On the actual and structural orality of the early Greek epics, see generally ERIC HAVELOCK, PREFACE TO PLATO (1963).

[84] On aural reading in ancient Greece, see JESPER SVENBRO, PHRASIKLEIA: AN ANTHROPOLOGY OF READING IN ANCIENT GREECE (Janet Lloyd trans., Cornell Univ. Press 1993) (1988); G.L. Hendrickson, *Ancient Reading*, 25 CLASSICAL J. 182 (1929).

[85] *See, e.g.*, Hans Blumenberg, *Light as a Metaphor for Truth: At the Preliminary Stage of Philosophical Concept Formation*, *in* MODERNITY, *supra* note 75, at 30; Dorothy Tarrant, *Greek Metaphors of Light*, 10 CLASSICAL Q. 181 (1960). The extent of pre-Hellenistic Greek visuality has traditionally been overestimated, partly because of the attention that modern scholars interested in the origins of Western philosophy have paid to pre-Hellenistic "light" metaphors, partly because of misapprehensions concerning the extent and influence of pre-Hellenistic literacy (*see supra* note 82), partly because virtually all of our knowledge of ancient Greek life comes from surviving visible texts, images, and artifacts, and partly because ancient Greek culture has repeatedly been described and defined by contrast with the seemingly more aural society of the ancient Hebrews (*see, e.g.*, THORLIEF BOMAN, HEBREW THOUGHT COMPARED WITH GREEK (1960)). *See generally* MARTIN JAY,

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DOWNCAST EYES: THE DENIGRATION OF VISION IN TWENTIETH-CENTURY FRENCH THOUGHT 28 (1993) (noting that "the Greek celebration of sight was more equivocal than is sometimes claimed").

[86] PLATO, *The Sophist* 263e (Francis M. Cornford trans.), *in* PLATO: THE COLLECTED DIALOGUES OF PLATO 957, 1011 (Edith Hamilton & Huntington Cairns eds., 1961); *see also* PLATO, *Theaetetus* 190a (Francis M. Cornford trans.), *in* PLATO: THE COLLECTED DIALOGUES OF PLATO, *supra*, at 845, 895-96 ("when the mind is thinking, it is simply talking to itself"). Homer literally depicted the thought process of his epic characters in this way. *See generally* Joseph Russo & Bennett Simon, *Homeric Psychology and the Oral Epic Tradition*, 29 J. HIST. IDEAS 483 (1968); R.W. Sharples, *"But Why Has My Spirit Spoken with Me Thus?": Homeric Decision-Making*, 30 GREECE & ROME 1 (1983).

[87] In the sixth century B.C., for instance, Heraclitus denoted "knowing" by a verb that could also mean "hearing" and believed that revelation required "listening to the *Logos*." *See* PHILIP WHEELWRIGHT, HERACLITUS 102-10 (1959); Evelyn F. Keller & Christine R. Grontworski, *The Mind's Eye*, *in* DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE 207, 221 (Sandra Harding & Merrill B. Hintikka eds., 1983). For a general discussion of the significance of aurality in the thought of Heraclitus, see Frances Dyson, *The Genealogy of the Radio Voice*, *in* RADIO RETHINK 167 (Diana Augaitis & Dan Lander eds., 1994).

[88] JAY D. BOLTER, WRITING SPACE: THE COMPUTER, HYPERTEXT AND THE HISTORY OF WRITING 110-11 (1991).

[89] *See generally* JAMIE JAMES, THE MUSIC OF THE SPHERES: MUSIC, SCIENCE AND THE NATURAL ORDER OF THE UNIVERSE 20-40 (1993); LEO SPITZER, CLASSICAL AND CHRISTIAN IDEAS OF WORLD HARMONY 7-17 (1963).

[90] YI-FU TUAN, PASSING STRANGE AND WONDERFUL: AESTHETICS, NATURE AND CULTURE 73 (1993); Carol G. Thomas & Edward K. Webb, *From Orality to Rhetoric: An Intellectual Transformation*, *in* PERSUASION: GREEK RHETORIC IN ACTION 3, 16 (Ian Worthington ed., 1994).

[91] LOUIS GERNET, THE ANTHROPOLOGY OF ANCIENT GREECE 143-215 (1981).

[92] SVENBRO, *supra* note 84, at 4, 114.

[93] Perhaps not coincidentally, one of the first Athenian lawgivers, Solon, was a poet. In the second century A.D., the Greek biographer Plutarch claimed that Solon had originally attempted to set his laws in verse, beginning:

music.[94] At one point in *The Republic*, Plato metaphorically described the just man as one who "must have put all three parts [of his soul] in tune with him, highest and lowest and middle, exactly like the three chief notes of a scale."[95]

From the fifth well into the twelfth century A.D., medieval Europe was likewise dependent on the full range of human senses. Early medieval religion was a highly tactile experience which for many individuals culminated in contact with a relic of the saints.[96] The words of God and man were primarily received from the lips of preacher and poet.[97] The limited number of available writings were not perused as much as pronounced.[98] It followed that early medieval "wise men" were those who "heard well."[99] Early medieval law depended for its efficacy on an orchestration of diverse sensory experiences—gestures, words, deliveries, blows, and even tastes—that enabled transactions to be remembered months, years,

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> First let us pray to Zeus, royal son of Cronos
> To grant my laws success and wide renown.

PLUTARCH, *Solon* 3.3, *in* THE RISE AND FALL OF ATHENS: NINE GREEK LIVES BY PLUTARCH 43, 45 (Ian Scott-Kilvert trans., Penguin Books 1960).

[94] In the fourth century B.C., Aristotle actually speculated that *nomos* meant both "law" and "tune" "because before men could write, they sang their laws, to avoid forgetting them . . . ." ARISTOTLE, PROBLEMS 920a, at 395 (Walter S. Hett trans., 1961).

[95] PLATO, *The Republic* 443d, *in* GREAT DIALOGUES OF PLATO 125, 244 (Eric H. Warmington & Philip G. Rouse eds., W.H.D. Rouse trans., 1956).

[96] On the high tactility of early medieval religion, see Heather Phillips, John Wyclif's *De Eucharistia* in its Medieval Setting 37 (1980) (unpublished Ph.D. dissertation, University of Toronto) (on file with author).

[97] Oral delivery undoubtedly had an impact on what was said. In the Anglo-Saxon epic *Beowulf*, for instance,

> action is presented less by visual particulars than by means of its material effects—often sound effects. There is consistent metonymy: we hear the footsteps of Beowulf, the scream of Grendel, the horn of Hygelac, the jingle of a mail-shirt. It would be easier to imagine *Beowulf* as an oratorio than as a . . . film.

Michael Alexander, *Introduction* to BEOWULF 9, 43 (Michael Alexander trans., Penguin Books 1973).

[98] Well into the ninth century, the lack of word separation in most manuscripts made this aural strategy virtually imperative. IVAN ILLICH & BARRY SANDERS, ABC: THE ALPHABETIZATION OF THE POPULAR MIND 46 (1988). *See generally* Paul Saenger, *The Separation of Words and the Physiology of Reading*, *in* LITERACY AND ORALITY 198 (David R. Olson & Nancy Torrance eds., 1991).

[99] In pre-Christian Norse mythology, for instance, the guardian of heaven, Heimdellr, was so wise that "he could hear the wool grow on the sheep and the grass grow in the fields." Alexander F. Chamberlain, *Primitive Hearing and "Hearing-Words"*, 16 AM. J. PSYCH. 119, 119 (1905). Right through the Middle Ages, Benedictine monks lived according to a Rule which analogously described spiritual wisdom as hearkening to the call of God. Norvene Vest, *Ear of the Heart*, 19 PARABOLA 42 (1994).

and even decades after the fact.[100] Jurisprudence thrived on oral stories[101] and vaguely poetic phrases.[102] Like early Greek law, law in the early Middle Ages also seems to have enjoyed a metaphorical connection with music.[103] This connection was made especially prominent in the legal writings of churchmen who apparently were influenced by both the neo-Pythagorean philosophy of the Late Roman bishop Augustine and their own everyday musical experiences in the chantries of cathedrals and monasteries.[104] In the mid-sixth century, the monk Cassiodorus opined that "when we commit injustice, we are without music." In 1096, Bishop Ivo of Chartes actually entitled the prologue to his collection of canons *De consonantia canonum*, "Of the Consonance [literally, a "sounding-together"] of the Canons."[105] Circa 1140, the monk Gratian evoked the Latin term *chorda* or "string" (of, e.g., a lyre) when he gave his *Decretum* the long-form title of *Concordia discordantium canonum*, or "The Concordance [or "Harmonizing"] of Discordant Canons."[106]

As both ancient Greece and medieval Europe became more familiar with and more dependent upon the written word, vision gained in intellectual and social status. In the early fourth century B.C., just as Greek literacy rates started to surge beyond marginality,[107] Plato had already declared sight to be "the source of the greatest benefit for us."[108] Later in the fourth century, Aristotle agreed that "seeing . . . is . . . the superior sense."[109] The unprecedentedly literate Hellenistic period[110] which began in Aristotle's lifetime and continued for three centuries after his death saw Greek painting displace more tactile sculpture and relief as the leading artistic form[111] and even become the conceptual model for poetry.[112] Contemporaneously, Greek law began to accord a greater privilege to visual expression.[113] Legal actions now had to be commenced by a written complaint.[114] More and more agreements were concluded by contracts made under seal.[115] Aristotle's metaphors for justice were notably visual rather than aural. In the *Ethics*, he figuratively described the ideal judge as a geometer: "Now the judge restores equality; it is as though there were a line divided into unequal parts, and he took away that by which the

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[100] M.T. CLANCHY, FROM MEMORY TO WRITTEN RECORD: ENGLAND 1066-1307, at 35-43 (2d ed. 1993); Hibbitts, *supra* note 79.

[101] In this context it may be no coincidence that in Anglo-Saxon law, a litigant's formal statement of claim was described as a *talu*—literally, a "tale." ANGLO-SAXON CHARTERS 366 (A.J. Robertson ed., 1956).

[102] *See, e.g.*, F.E. HARMER, ANGLO-SAXON WRITS 85-92 (1952); Dorothy Bethurum, *Stylistic Features of the Old English Laws*, 27 MOD. LANGUAGE REV. 262 (1932).

[103] For instance, the singular form (*lag*) of the term *log*, which meant "law" in Old Norse, also meant "tune." Philip Moseley, *Laying Down the Law: Bruce Chatwin's* The Songlines *and Australian Aboriginal Concepts of Land*, *in* 3 LAW AND SEMIOTICS 267, 274 (Roberta Kevelson ed., 1989).

[104] *See generally* PETER JEFFERY, RE-ENVISIONING PAST MUSICAL CULTURES: ETHNOMUSICOLOGY IN THE STUDY OF GREGORIAN CHANT (1992); Stephen G. Nichols, *Voice and Writing in Augustine and in the Troubadour Lyric*, *in* VOX INTEXTA: ORALITY AND TEXTUALITY IN THE MIDDLE AGES (A.N. Doane & Carol B. Pasternack eds., 1991).

[105] STEPHEN KUTTNER, *Harmony from Dissonance: An Interpretation of Medieval Canon Law*, *in* THE HISTORY OF IDEAS AND DOCTRINES OF CANON LAW IN THE MIDDLE AGES 1, 4 (1980).

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> Of course, *concordia* is etymologically derived from *cor*, *cordis*, 'the heart' and stands for 'an agreement of hearts, peace, order,' but the association with *chorda*, 'string,' leading to the idea of a 'harmony of strings,' gives the word 'a poetic ambivalence which allows for a kind of metaphysical punning'; indeed we find an interchangeable use of 'consonance' and *concordia* in the *Vulgate*, in St. Augustine, in Boethius, to name only a few. If we consider the importance of musical theory for St. Augustine as a key to the understanding of the divine order of creation and salvation, it is surely no idle playing with words to point out these musical implications (should we say 'overtones'?) of Gratian's thought.

Id. at 4 (footnote omitted).

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[107] On the early fourth-century surge in Greek literacy, see HARRIS, *supra* note 82, at 115.

[108] PLATO, *Timeus* 47a (Benjamin Jowett trans.), *in* PLATO: THE COLLECTED DIALOGUES OF PLATO, *supra* note 86, at 1151, 1174. On visualist expressions and metaphors in the works of Plato, see HANS JONAS, THE PHENOMENON OF LIFE: TOWARDS A PHILOSOPHICAL BIOLOGY 135 (1966); Keller & Grontworski, *supra* note 87, at 210-11. *But see also* EVA C. KEULS, PLATO AND GREEK PAINTING 47 (1978) ("The sense of sight and the one art which relates exclusively to vision, painting, furnish Plato's favorite metaphors for everything which he considers relative, transitory and deceptive.").

[109] 1 ARISTOTLE, *On Sense and the Sensible* 437a (J.I. Bearle trans.), *in* THE WORKS OF ARISTOTLE 673, 673 (Robert M. Hutchins ed., 1952).

[110] On literacy and the uses of writing in the Hellenistic period, see generally PETER BING, THE WELL-READ MUSE: PRESENT AND PAST IN CALLIMACHUS AND THE HELLENISTIC POETS (1988).

[111] Simone Besques-Mollard, *Historical Summary: Greek Art*, *in* LAROUSSE ENCYCLOPEDIA OF PREHISTORIC AND ANCIENT ART 291 (René Huyghé ed., 1962).

[112] The analogy between painting and poetry, prompted in part by the growing tendency to write or inscribe poetry on a surface, can be traced back to Plato ("[T]he poet is . . . the counterpart of the painter." PLATO, *The Republic* 605a, *in* PLATO: THE COLLECTED DIALOGUES OF PLATO, *supra* note 86, at 575, 830) and, beyond him, to the sixth century B.C. poet Simonides ("Painting is silent poetry; poetry is painting that speaks." *Quoted in* C.M. BOWRA, THE GREEK EXPERIENCE 155 (1957)). Simonides's qualifications to the comparison accurately reflected the more attenuated relationship between painting and poetry in his less literate age.

[113] ROSALIND THOMAS, LITERACY AND ORALITY IN ANCIENT GREECE 89 (1992).

[114] George M. Calhoun, *Oral and Written Pleading in Athenian Courts*, 50 TRANSACTIONS & PROC. AM. PHILOLOGICAL ASS'N 177 (1919).

[115] HARRIS, *supra* note 82, at 73, 120; *see also* Robert J. Bonner, *The Use and Effect of Attic Seals*, 3 CLASSICAL PHILOLOGY 399 (1908).

greater segment exceeds the half, and added it to the smaller segment. . . . [T]he judge . . . is one who bisects . . . ."[116]

Europe experienced a similar turn towards the visual after its literacy levels increased dramatically in the twelfth and thirteenth centuries A.D.[117] New architectural styles brought unprecedented amounts of light—much of it filtered through colorful stained glass[118]—into churches and cathedrals that could now be stocked with a vast array of images intended to serve as the "books of the illiterate."[119] Sight became the principal metaphor of spiritual knowledge and revelation;[120] the taking of the Holy Eucharist was reconceived as a primarily visual experience that depended on the ability of the congregation to see the elevation of the Host.[121] Monastic scribes began to reorganize the layout of texts to facilitate purely visual (i.e., silent) reading.[122] Heraldry evolved into a complex visual code of chivalric identification and allegiance. The scientific community became fascinated with optics.[123] Befitting the increased importance of writing in this period, someone invented reading glasses.[124] At roughly the same time, the mirror became a fixture in life and, via metaphor, in literature: in the later Middle Ages a flood of works on a multitude of subjects incorporated the word "mirror" (in Latin, *speculum*) into their titles.[125] European law became notably "spectacular" as lawyers and jurists adopted brightly colored robes[126] and began to sit in courtrooms decorated with allegorical paintings.[127] Rules, procedures, and precedents were increasingly set down in treatises, customals, and codes, the finer copies of which were illuminated with detailed pictures of legal situations[128] and allegorical tables of legal relations.[129] Heraldry's popularity suggested the term "by color of office" (later extended to "color of law" and "color of title") as a metaphor for the appearance, if not the fact, of legal right and power.[130] In response to another aspect of contemporary visuality, several late medieval legal texts, and even several famous late medieval lawyers, were metaphorically described as "mirrors" that reflected what was good or right for the community.[131]

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[116] ARISTOTLE, *Ethica Nicomachea* 1132a (W.D. Ross trans.), *in* INTRODUCTION TO ARISTOTLE 308, 406 (Richard McKeon ed., 1947).

[117] J. HUIZINGA, THE WANING OF THE MIDDLE AGES 284 (1954) ("One of the fundamental traits of the mind of the declining Middle Ages is the predominance of the sense of sight . . . ."); *see also* R.W. SCRIBNER, FOR THE SAKE OF SIMPLE FOLK: POPULAR PROPAGANDA FOR THE GERMAN REFORMATION 3-5 (1981). On literacy levels in the late medieval period, see generally HARVEY J. GRAFF, THE LEGACIES OF LITERACY: CONTINUITIES AND CONTRADICTIONS IN WESTERN CULTURE AND SOCIETY 53-74 (1987).

[118] On the late medieval fascination with light and color, see UMBERTO ECO, *The Aesthetics of Light*, *in* ART AND BEAUTY IN THE MIDDLE AGES 43 (Hugh Bredin trans., Yale Univ. Press 1986) (1959).

[119] On the late medieval "explosion of images," see JACQUES ELLUL, THE HUMILIATION OF THE WORD 186-92 (Joyce M. Hanks ed., 1985); HUIZINGA, *supra* note 117, at 151-52. On images as the "books of the illiterate" (a concept originally propounded by Pope Gregory I in the sixth century, but increasingly influential in this period), see CARLOS M.N. EIRE, WAR AGAINST THE IDOLS: THE REFORMATION OF WORSHIP FROM ERASMUS TO CALVIN 19 (1986).

[120] *See generally* CAROLLY ERICKSON, THE MEDIEVAL VISION: ESSAYS IN HISTORY AND PERCEPTION (1976).

[121] *See, e.g.*, MIRI RUBIN, CORPUS CHRISTI: THE EUCHARIST IN LATE MEDIEVAL CULTURE 60-63 (1991).

[122] IVAN ILLICH, IN THE VINEYARD OF THE TEXT: A COMMENTARY TO HUGH'S DIDASCALICON 93-107 (1993); *see also* MICHAEL CAMILLE, IMAGE ON THE EDGE: THE MARGINS OF MEDIEVAL ART 18-20 (1992); Paul Saenger, *Silent Reading: Its Impact on Late Medieval Script and Society*, 13 VIATOR 367 (1982).

[123] *See generally* KATHERINE H. TACHAU, VISION AND CERTITUDE IN THE AGE OF OCKHAM: OPTICS, EPISTEMOLOGY AND THE FOUNDATIONS OF SEMANTICS 1250-1345 (1988).

[124] Edward Rosen, *The Invention of Eyeglasses*, 11 J. HIST. MED. 13 (1956).

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[125] *See generally* HERBERT GRABES, THE MUTABLE GLASS: MIRROR-IMAGERY IN TITLES AND TEXTS OF THE MIDDLE AGES AND ENGLISH RENAISSANCE (1973).

[126] W.N. HARGREAVES-MAWDSLEY, A HISTORY OF LEGAL DRESS IN EUROPE 4-8, 46-60, 104-11 (1963); J.H. Baker, *A History of English Judges' Robes*, 12 COSTUME 27, 29-32 (1978).

[127] SAMUEL Y. EDGERTON, JR., *Icons of Justice*, *in* PICTURES AND PUNISHMENT: ART AND CRIMINAL PROSECUTION DURING THE FLORENTINE RENAISSANCE 21 (1985); CRAIG HARBISON, THE LAST JUDGMENT IN SIXTEENTH CENTURY NORTHERN EUROPE: A STUDY OF THE RELATION BETWEEN ART AND THE REFORMATION 51-64 (1976); JOHN LARNER, CULTURE AND SOCIETY IN ITALY, 1290-1420, at 79-80 (1971).

[128] *See generally* HALLDÓR HERMANNSSON, ILLUMINATED MANUSCRIPTS OF THE JÓNSBÓK (1940); ANTHONY MELNIKAS, THE CORPUS OF MINIATURES IN THE MANUSCRIPTS OF DECRETUM GRATIANII (1975); Malcolm Letts, *The Sachsenspiegel and Its Illustrators*, 49 LAW Q. REV. 555 (1933); Jean-Claude Schmitt, *Le miroir du canoniste: Les images et le texte dans un manuscrit médiéval*, 6 ANNALES: ÉCONOMIES, SOCIÉTÉS, CIVILISATIONS 1471 (1993). On occasion, individual legal documents were also illustrated. A charter recording Edward I's grant of hunting rights to one Roger of Pilkington in 1291 "is surrounded on all four sides with good coloured drawings of animals, birds and trees, as if to embody the privileges it grants." CLANCHY, *supra* note 100, at 195. Such depictions became increasingly useful as legal texts began to circulate more generally among members of what were still only semiliterate populations. Michael Camille, *At the Edge of the Law: An Illustrated Register of Writs in the Pierpont Morgan Library*, *in* ENGLAND IN THE FOURTEENTH CENTURY 1, 5-6 (Nicholas Rogers ed., 1993).

[129] For example, a thirteenth-century French manuscript of Gratian's *Decretum* sets the "Table of Consanguinity" in the allegorical embrace of Time, drawn as a king. *Reproduced in* JACQUES LE GOFF, MEDIEVAL CIVILIZATION: 400-1500, at plate 16 (Julia Barrow trans., Basil Blackwell 1988) (1964). In a fifteenth-century work, the same "table" is allegorically presented as a "Tree of Affinities." *Reproduced in* Gombrich, *supra* note 47, at 256.

[130] Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 396 (1992).

[131] Perhaps the most famous example of a legal "mirror"-text is the German *Sachsenspiegel*, or "Mirror of the Saxons," composed in the early thirteenth century; also note the rather more dubious English work, *Mirror of Justices*, written in Law French circa 1285-1290, and the canon law text, *Speculum Abbreviatum* ("Abbreviated Mirror"), composed in Germany in the early fourteenth century. As to lawyers being identified as "mirrors," note the thirteenth-century French canonist Guillaume Durand, known as Speculator

The ascendancy of sight that marked Hellenistic Greece and late medieval Europe did not, however, automatically lead to denigration of the other senses and their manifestations. So long as manuscripts were rare and expensive and literacy was still far from "universal," these societies continued to be characterized by a sensory partnership of sorts.[132] While giving overall first place to the sense of sight, Aristotle insisted that "for developing [intelligence] . . . hearing . . . takes the precedence."[133] Rhetoric remained at the heart of both Hellenistic and late medieval education. Outside the medieval universities (and occasionally even inside), private reading still took the form of reciting, and inscription was frequently accompanied by dictation.[134] Written formats continued to echo venerable aural habits. Dialogues remained popular,[135] as did written poetry dealing with both fictional and scholarly subjects.[136] Some literary works explicitly claimed aural origins: both Chaucer's *Canterbury Tales* and Boccaccio's *Decameron* were presented to their publics as the products of oral storytelling sessions. Authors addressed their readers as if the latter could hear the words they had written (as they often could, given the habit of recitative reading);[137] in many written works, "informing" was metaphorically expressed as "speaking," and "learning" was expressed as "hearing."

(probably for his 1271 work, *Speculum judiciale*), the early fourteenth-century Italian canonist Joannes Andrae, called *speculum et lumen juris canonici* ("mirror and light of the canon law"), and the contemporary Italian commentator Bartolus, referred to simply as *speculum juris* ("mirror of the law"). *See generally* DAVID M. WALKER, THE OXFORD COMPANION TO LAW 384, 1169-70 (1980).

[132] For extended discussions of the "equilibrium" of the aural and the visual which marked the later Middle Ages, see CLANCHY, *supra* note 100, at 266-72; D.R. Woolf, *Speech, Text and Time: The Sense of Hearing and the Sense of the Past in Renaissance England*, 18 ALBION 159, 166-71 (1986).

[133] 1 ARISTOTLE, *supra* note 109, 437a, at 673. *See generally* Anfinn Stigen, *On the Alleged Primacy of Sight—With Some Remarks on Theoria and Praxis—in Aristotle*, 37 SYMBOLAE OSLOENSES 14 (1962).

[134] On the intersection of speaking, writing, and reading from the twelfth century, see CLANCHY, *supra* note 100, at 266-72; Joyce Colemen, *The Solace of Reading: Late Medieval Views on the Reading Aloud of Literature*, 46 ARV: SCANDINAVIAN Y.B. FOLKLORE 123 (1990); Ruth Crosby, *Oral Delivery in the Middle Ages*, 11 SPECULUM 88 (1936).

[135] On the fortunes of the dialogue form in Europe from the twelfth to the mid-fifteenth century, see K.J. Wilson, *The Continuity of Post-Classical Dialogue*, 21 CITHARA 23 (1981); *see also* W.A. Davenport, *Patterns in Middle English Dialogues*, *in* MEDIEVAL ENGLISH STUDIES PRESENTED TO GEORGE KANE 144 (Edward D. Kennedy et al. eds., 1988).

[136] On the medieval use of poetry as a scholarly form, see Lynn Thorndike, *Unde Versus*, 11 TRADITIO 163 (1955).

[137] Thus, the repeated formula in Froissart's *Chronicles* (circa 1400): "as you have heard." Woolf, *supra* note 132, at 159.

Hellenistic and later medieval law reflected the ambivalent sensory situation of their societies. In both contexts, many of the old multi-sensory ceremonies and rituals appear to have survived—if not always in their original forms, then at least in fashions that accommodated the written word.[138] Legal writing reflected contemporary literary practices by evoking aurality in several ways. Little Hellenistic legal literature has survived, but it may be significant that most of Aristotle's surviving works, including those on law and justice, have come down to us as lecture notes.[139] Late medieval statutes were often labelled and recalled by their *incipits*, i.e., the first few words of their texts as heard when read aloud.[140] A variety of late medieval legal manuals, treatises, and law reports were set down as dialogues.[141] Finally, late medieval jurists repeatedly referred to themselves or to the authors of earlier legal works as "speaking" presences,[142] described legal knowledge or opinions as things "said" or "heard,"[143] understood statutory language as speech as opposed to text,[144] and, on a number of occasions, even cited poetic verses.[145]

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[138] In late medieval England, for example, conveyances that might previously have involved the transfer of a symbol, such as a knife, were instead based on the transfer of a document with the symbol physically attached. *See* CLANCHY, *supra* note 100, at 39.

[139] JONATHAN BARNES, ARISTOTLE 3 (1982). Four of Aristotle's books on justice, now lost, were apparently written as dialogues. T.A. Sinclair, *Introduction* to ARISTOTLE: THE POLITICS 9, 11 (T.A. Sinclair trans., 1962).

[140] Thus, the famous thirteenth-century English property statute *Quia Emptores* ("Because the purchasers"). Compare this style of naming with the contemporary habit of referring to the Christian "Lord's Prayer" (still more often heard than read) as the "Our Father."

[141] Note, for example, the thirteenth-century *Court Baron*, Sir John Fortescue's fifteenth-century *In Praise of the Laws of England*, and Christopher St. Germain's early sixteenth-century *Doctor and Student*. Dialogue format was also employed in the early English Year Books. T.F.T. PLUCKNETT, EARLY ENGLISH LEGAL LITERATURE 102 (1958).

[142] In the late thirteenth century, for instance, Phillippe de Beaumanoir wrote that the chapters in his *Coutumes de Beauvaisis* would "speak to" different topics, and frequently looked back on past subjects with the words: "We have spoken of . . . ." THE COUTUMES DE BEAUVAISIS OF PHILLIPPE DE BEAUMANOIR 5, 21 (F.R.P. Akehurst trans., 1992). Contemporary illuminated manuscripts actually depicted Beaumanoir as speaking or reciting to an audience. CAMILLE, *supra* note 122, at 2.

[143] Thus Littleton (in translation from Law French): "It is commonly said, that there be three warranties . . . ." LITTLETON'S TENURES sec. 697, at 312 (Eugene Wambaugh ed., 1903). "I have heard say, that in the time of King Richard the Second . . . ." *Id.* sec. 720, at 322. "And upon this I have heard reason . . . ." *Id.* sec. 739, at 333.

[144] Again, Littleton: "Also, it is spoken in the end of the said statute of Gloucester, which speaketh of the alienation with warranty made by the tenant by the curtesy . . . ." *Id.* sec. 728, at 326.

[145] *See, e.g.*, 1 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND fol. 1b (George E. Woodbine ed. & Samuel E. Thorne trans., 1968); SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE 15 (S.B. Chrimes trans., 1942) (1545-1546); LITTLETON, *supra* note 143, sec. 384, at 184; sec. 443, at 210; sec. 749, at 338.

The invention of the printing press in the mid-fifteenth century and its spread throughout Europe in the sixteenth and seventeenth centuries encouraged a further increase in personal and social literacy levels and, with that, a further increase in cultural respect for, and interest in, vision.[146] In the changing spirit of the time, the English poet Robert Herrick wrote "[w]e credit most our sight; one eye doth please/Our trust . . . more than ten eare-witnesses [sic]."[147] The French philosopher René Descartes pointedly analogized vision and thought: "We shall learn how to employ our mental intuition by comparing it with the way that we employ our eyes."[148] A child of the black and white printed text rather than of the colorful iconographic manuscript, Descartes was more interested in the disembodied "mind's eye" of the imagination[149] than in the physical perception of images,[150] but he regarded cogitation as a "seeing" notwithstanding.[151]

Consistent with the textualized immateriality of Cartesian vision, seals gave way to signatures on ordinary legal documents.[152] Law books gradually lost most of their illustrations and allegorical settings,[153] while courtrooms across Europe (like many churches) were stripped of much of their artwork.[154] The working robes of many lawyers and judges faded to a combination of black and white that incidentally evoked the colors (and in doing so, perhaps also the authority) of the printed page.[155] The ancient figure of Justice was blindfolded to save her from distracting images.[156] Under the impetus of line and letters, the general visuality of law was nonetheless preserved and even magnified. Following in the footsteps of Continental rhetorician Peter Ramus, leading English legal scholars such as Sir Edward Coke and Henry Finch promoted the usage of schematic, dichotomizing diagrams to clarify legal concepts and arguments.[157] Jurists became more willing to deal with legal treatises as visual and not figuratively aural works.[158] They

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[146] *See generally* McLUHAN, *supra* note 44. *See also* HAROLD A. INNIS, THE BIAS OF COMMUNICATION 138 (1951) ("The discovery of printing in the middle of the fifteenth century implied the beginning of . . . a type of civilization dominated by the eye rather than the ear."); ROBERT K. LOGAN, THE ALPHABET EFFECT: THE IMPACT OF THE PHONETIC ALPHABET ON THE DEVELOPMENT OF WESTERN CIVILIZATION 185 (1986) ("Print reinforces the visual bias of the alphabet. It makes literary material more available and hence creates a greater dominance over the spoken word than manuscript writing does.").

[147] Synnott, *supra* note 55, at 618.

[148] *Quoted in* Keller & Grontworski, *supra* note 87, at 214.

[149] *Id.*

[150] For more on the epistemological shift from pictorial "image" to text-driven "imagination" and its cultural and legal implications in the seventeenth and eighteenth centuries, see JAMES FENTRESS & CHRIS WICKHAM, SOCIAL MEMORY 13-14 (1992); Steven Wilf, *Imagining Justice: Aesthetics and Public Executions in Late Eighteenth Century England*, 5 YALE J.L. & HUMAN. 51 (1993). Print was ultimately (if not initially) unfriendly to images and the medieval pictorial tradition in part because the boost which its low cost and mass availability gave to popular literacy made pictures less necessary as textual equivalents, and in part because it could not readily reproduce either the colors or the fine texture of the old illuminations. *See, e.g.*, BOLTER, *supra* note 88, at 73 (discussing how print technology encouraged a segregation of image and text which effectively subordinated the image by confining it to a specific small portion of the book (the "Plates")); ANNE HOLLANDER, MOVING PICTURES 33-38 (1991) (discussing how print's growing popularity and cultural power contributed to a certain suppression of color in post-sixteenth-century European painting).

[151] *See generally* JAY, *supra* note 85, at 69-82.

[152] MICHEL PASTEREAU, FIGURES ET COULEURS: ÉTUDES SUR LA SYMBOLIQUÉ ET LA SENSIBILITE MÉDIÉVALES 72 (1986).

[153] For instance, the early editions of *Coke on Littleton* contained a "Table of Consanguinity" that, although possessing an allegorical element (this time emphasizing the patri-

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archal power of the father), was neither framed nor subordinated by allegory in the same way that earlier Tables had been. *See* EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND sec. 13, at 19 (photo. reprint 1979) (1628). In 1766, the allegorical aspects of the "Table of Descent" included in the first edition of Blackstone's *Commentaries* would be minimal, being limited to the representation of handshakes denoting marriages, and ropes indicating lines of relation. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 240 (photo. reprint 1979) (1766).

[154] This process continued into the late eighteenth century, culminating in the radical de-iconization of the Parisian Palais de Justice after the French Revolution. In the long run, however, the French government came to regret its initial asceticism, and in the nostalgic days of Napoleon III's Second Empire restored at least a measure of iconic grandeur to the criminal courts of the Palais. *See generally* KATHERINE F. TAYLOR, IN THE THEATRE OF CRIMINAL JUSTICE: THE PALAIS DE JUSTICE IN SECOND EMPIRE PARIS (1993).

[155] *See generally* HARGREAVES-MAWDSLEY, *supra* note 126, at 9-14, 89-91, 110. *See also* J.H. Baker, *History of the Gowns Worn at the English Bar*, 9 COSTUME 15 (1975); Baker, *supra* note 126, at 27, 32-38.

[156] Peter Goodrich, *Critical Legal Studies in England: Prospective Histories*, 12 OXFORD J. OF LEGAL STUD. 195, 225 (1992) ("Visual representations of faith were outlawed . . . at the same time that English law became a textual tradition and *Justitia* was rendered sightless. In the specific terms of English law the text came to take the place, not least by virtue of the facilities and reproductional capacities of print technologies, of the image."). The apparent contradiction between a blindfolded figure of Justice and increased respect for texts may be resolved if one recalls that when Justice was blindfolded in the sixteenth and seventeenth centuries, texts still tended to be read aloud. *See* William Nelson, *From 'Listen, Lordings' to 'Dear Reader,'* 46 U. TORONTO Q. 110, 113 (1976-77).

[157] On Ramist rhetoric and the popularization of visual diagrams in the sixteenth and seventeenth centuries, see WALTER J. ONG, RAMUS, METHOD AND THE DECAY OF DIALOGUE: FROM THE ART OF DISCOURSE TO THE ART OF REASON 83-91, 107-10 (1958); Walter J. Ong, *From Allegory to Diagram in the Renaissance Mind*, 17 J. AESTHETICS & ART CRITICISM 423 (1959). On Ramism and Henry Finch, see Wilfred Prest, *The Dialectical Origins of Finch's Law*, 36 CAMBRIDGE L.J. 326 (1977).

[158] For instance, Coke followed the traditional pattern in frequently referring to Littleton as having "spoken," or having "said" something, but he occasionally departed from this phraseology by saying, "Littleton showeth here," or the like, indicating an approach to the words as visual text. *See, e.g.*, COKE, *supra* note 153, sec. 2, at 10; sec. 247, at 167; sec. 248, at 168; sec. 286, at 185; sec. 288, at 186. Likewise, Coke at one point remarked, "let us heare what our Author will say." *Id.* sec. 241, at 164. At another point he announced, "let us turne our eye to." *Id.* sec. 241, at 165.

frequently, if not yet consistently, regarded themselves and their readers as "observers."[159] Some expressly offered the public a "view" or "image" of the law;[160] a few conceived of legal wisdom as a metaphorical matter of light.[161] Referring to a surveyor's measuring instrument, Coke at one point called law a "golden metwand."[162] Late in the seventeenth century, the German legal philosopher and mathematician Gottfried Leibniz elaborated the ancient Aristotelian notion of law as geometry.[163]

In the eighteenth and nineteenth centuries, writing and visuality matured together. European and American literacy rates reached unprecedented levels.[164] Philosophers actually proclaimed the 1700s the "Age of Enlightenment." In the 1800s, paeans to sight became commonplace.[165] John Ruskin wrote that "[t]he greatest thing a human soul ever does in this world is to see something. . . . To see clearly is poetry, prophecy, and religion, all in one."[166] Ralph Waldo Emerson declared that at the moment of epiphany, "I become a transparent eyeball; I am nothing; I see all."[167] In a variety of contexts, vision became a sensory cipher for the exercise of power. Styles of landscape gardening that provided the upper-class householder with a pleasing view of his estate gave him power over nature.[168] Designs for asylums and prisons (such as Jeremy Bentham's "Panopticon") that enabled authorities to continually survey their inmates gave the sane power over the insane, and the law-abiding power over the criminal.[169] Vision even became an instrument of imperialism, as didactic and theatric exhibitions at home of exotic colonial lifestyles abroad gave Europeans psychological power over their overseas possessions.[170]

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[159] *See, e.g.*, EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWES OF ENGLAND cap. 1, at 21, 29, 31, 33, 44; cap. 5, at 63; cap. 7, at 74 (photo. reprint 1979) (1641). But see also *id.* cap. 1, at 24; cap. 8, at 82; cap. 9, at 97; cap. 38, at 211; cap. 53, at 259; cap. 73, at 317, for instances where Coke refers to himself and his readers as "speakers."

[160] Thus, John Doderidge wrote that he had composed his work for those "who covet to contemplate with their inward eye the express and perfect image of an English Lawyer [and who desire] to view [various aspects of law] in their particular charge and duty." JOHN DODERIDGE, THE ENGLISH LAWYER 1 (London, Assignes of J. More, Esq. 1631).

[161] COKE, *supra* note 153, *Epilogus*, at 395 (wishing his students "the gladsome light of Jurisprudence"); *see also* HENRY FINCH, LAW OR A DISCOURSE THEREOF 5 (photo. reprint 1978) (1759) (writing of "reason" in relation to law: "[T]hrough Adam's fall . . . that excellent image of reason is now so wonderfully defaced, even in the best and wisest, that the light of this, as the light of the moon, shineth more obscurely, but yet shineth, so that from it all the other laws receive their light.").

[162] For a brief discussion of visual metaphors in Coke's writing, see STEPHEN D. WHITE, SIR EDWARD COKE AND "THE GRIEVANCES OF THE COMMONWEALTH" 1621-1628, at 51 (1979).

[163] *See generally* M.H. Hoeflich, *Law and Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986). *See also* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 16-20 (1983).

[164] *See generally* JAMES S. ALLEN, IN THE PUBLIC EYE: A HISTORY OF READING IN MODERN FRANCE, 1800-1940 (1991); WILLIAM J. GILMORE, READING BECOMES A NECESSITY OF LIFE: MATERIAL AND CULTURAL LIFE IN RURAL NEW ENGLAND, 1780-1835 (1989); GRAFF, *supra* note 117, at 173-372; DAVID F. MITCH, THE RISE OF POPULAR LITERACY IN VICTORIAN ENGLAND: THE INFLUENCE OF PRIVATE CHOICE AND PUBLIC POLICY (1992).

[165] It has been said that "the nineteenth century was among the most visual periods of western culture, the most given to precise observation—a spectator-like view shared by novelists, painters, scientists, and, to an extent, by poets, who became 'visionary,' although poetic vision did not always mean observation." WYLIE SYPHER, LITERATURE AND TECHNOLOGY: THE ALIEN VISION 74 (1968).

[166] DIANE ACKERMAN, A NATURAL HISTORY OF THE SENSES 227 (1990) (quoting John Ruskin's *Modern Painters*).

In English law, William Blackstone set his *Commentaries* in a metaphoric language that was strikingly visualist, especially considering that his work was born as a series of lectures wherein aural metaphors would have been tolerated and even naturally expected. Blackstone repeatedly made "observations,"[171] analyzed legal powers from various "views" or "points of view,"[172] and reported that truths "appear."[173] He notably regarded himself as offering the prospective law student "a general map" of the law,[174] which he later described in visual terms as a magnificent, if somewhat antiquated, "Gothic castle."[175] In American law, visuality similarly manifested itself in the form, and even arguably in some of the features, of the written Constitution approved at Philadelphia.[176] Thomas Jefferson proclaimed that the Constitution was "a good canvas, on which some strokes only want retouching";[177] he called the principles protected in the Bill of Rights a "bright constellation" which had guided the republic through the course of revolution and reformation.[178] Early in the nineteenth century, Chief Justice John Marshall's constitutional jurisprudence was fraught with visual metaphors, some of which were inspired by the very visibility of the document he was construing.[179] Later in the nineteenth century, such English and American legal educators as Albert Venn Dicey, Frederick Pollock, and Christopher Columbus Langdell employed the radically disembodied visual metaphor of law as geometry[180] to reconceive freedom "as a set of barriers against coercive intrusion into zones of autonomous conduct."[181] English legal historian Frederic Maitland pioneered the similarly abstract characterization of law as a visible "seamless web."[182] It was nonetheless another jurist, Oliver Wendell Holmes, Jr., who best reflected the sensory bias of the age. Holmes repeatedly approached law, not to mention life and language,[183] as a matter of looking. It was he who first described law as a "magic mirror";[184] it was he who first advanced the notion that law could be found in a "penumbra."[185] Such metaphoric language gave law, not to mention his own words, extraordinary power and presence in an unprecedentedly visualist culture.

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[167] RALPH W. EMERSON, NATURE 8 (1849). On visuality in mid-nineteenth-century American literature generally, see, for example, RICHARD RUDISILL, MIRROR IMAGE: THE INFLUENCE OF THE DAGUERREOTYPE ON AMERICAN SOCIETY 16-24 (1991) (discussing how preexisting American visuality guaranteed a "favorable climate for the daguerrotype to exert a profound influence on the nation"). On visuality in mid-nineteenth-century English literature, see, for example, Audrey Jaffe, *Spectacular Sympathy: Visuality and Ideology in Dicken's* A Christmas Carol, 109 PUB. MOD. LANGUAGE ASS'N 254 (1994).

[168] On the predominantly "visual" gardening styles of the seventeenth and eighteenth centuries, see CLASSEN, *supra* note 80, at 26-29; YI-FU TUAN, TOPOPHILIA: A STUDY OF ENVIRONMENTAL PERCEPTION, ATTITUDES AND VALUES 140 (1974).

[169] On surveillance and the prevailing concept of madness, see MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON 70 (Richard Howard trans., Random House 1965) (1961) ("During the classical period, madness was shown, but on the other side of bars; if present, it was at a distance, under the eyes of reason that no longer felt any relation to it and that would not compromise itself by too close a resemblance. Madness had become a thing to look at . . . ."). On surveillance and eighteenth-century criminal punishment, see MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 170-228 (Alan Sheridan trans., Pantheon Books 1979) (1975).

[170] *See generally* Timothy Mitchell, *The World as Exhibition*, 31 COMP. STUD. SOC. HIST. 217 (1989); Joseph Roach, *The Artificial Eye: Augustan Theater and the Empire of the Visible*, *in* THE PERFORMANCE OF POWER: THEATRICAL DISCOURSE AND POLITICS 131 (Sue Ellen Case & Janelle Reinett eds., 1991). For a discussion of how visual (photographic) images still serve to express and consolidate the West's power over Third World cultures, see generally CATHERINE A. LUTZ & JANE L. COLLINS, READING NATIONAL GEOGRAPHIC (1993).

[171] *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 49, 87, 97, 129, 230, 282 (photo. reprint 1979) (1765).

[172] *See, e.g.*, *id.* at 183, 220.

[173] *See, e.g.*, *id.* at 145, 203.

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[174] *Id.* at 35. A comment of Walter Ong's may help to put this metaphor in context in a way that underlines the relationship between print and visuality: "Only after print and the extensive experience with maps that print implemented would human beings, when they thought about the cosmos or universe or 'world' [or here, law], think primarily of something laid out before their eyes, as in a modern printed atlas . . . ." WALTER J. ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD 73 (1982).

[175] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 268 (photo. reprint 1979) (1768).

[176] On the technological and cultural roots of America's written Constitution, see MICHAEL WARNER, *Textuality and Legitimacy in the Printed Constitution*, *in* THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH-CENTURY AMERICA 97 (1990); Patrick H. Hutton, *The Print Revolution of the Eighteenth Century and the Drafting of Written Constitutions*, 56 VT. HIST. 154 (1988); Walter F. Pratt, Jr., *Oral and Written Cultures: North Carolina and the Constitution 1787-1791*, *in* THE SOUTH'S ROLE IN THE CREATION OF THE BILL OF RIGHTS 77 (Robert J. Haws ed., 1991).

[177] Letter from Thomas Jefferson to James Madison (July 31, 1788), *in* 13 PAPERS OF THOMAS JEFFERSON 442 (Julian P. Boyd ed., 1956).

[178] Thomas Jefferson, *First Inaugural Address*, *in* 1 MESSAGES AND PAPERS OF THE PRESIDENTS 323-24 (James D. Richardson ed., 1908).

[179] Thus in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall declared:

> Those then who controvert the principle that the constitution is to be considered . . . are reduced to the necessity of maintaining that courts must *close their eyes* on the constitution, and *see only the law*.
>
> . . . .
>
> Could it be that the intention of those who gave this power, to say that in using it the constitution *should not be looked into*?
>
> . . . .
>
> In some cases, then, the constitution *must be looked into* by the judges.

Id. at 178-79 (emphasis added); *see also* Pierre Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929, 931 n.8 (1988).

The added boost that print provided to the social and intellectual status of vision gradually undermined the position still occupied by the other forms of sensory experience in the Western tradition. In societies no longer so unfamiliar or uncomfortable with the visible word that they needed sound, touch, or savor to ensure their own survival, those senses could be abandoned as primary carriers of information; in some instances they could even be condemned. Aurality suffered especially. From the seventeenth through the nineteenth centuries (with perhaps a brief interruption during the consciously nostalgic days of Romanticism),[186] speech was radically severed from writing and reading; the latter became almost universally understood as silent practices having a distinct and superior syntactic style.[187] Rhetoric was transformed into the more visual study of composition and *belles-lettres*.[188] At least among the "reading" middle and upper classes, silence became a powerful norm of social etiquette and order.[189] Aural concepts such as the "music of the spheres" were driven from the realm of Newtonian science.[190] Written literature cast off most of the aural forms it had previously assumed. The dialogue first became strangely "monologic,"[191] and then was virtually abandoned as a leading literary device.[192] Poetry, to the extent it was not supplanted by less aurally appealing prose,[193] was increasingly written not for the ear, but for the eye.[194] Once again, the form as a whole was analogized to painting—*ut pictura poesis*.[195]

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[180] On the history of the idea of "law as geometry" in the eighteenth and nineteenth centuries, see Grey, *supra* note 163, at 16-20; Hoeflich, *supra* note 163.

[181] Robert Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, *in* PROFESSION AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 90 (Gerald L. Geison ed., 1983).

[182] Ethan Katsh, *Law in a Digital World: Computer Networks and Cyberspace*, 38 VILL. L. REV. 403, 403 n.3 (1993).

[183] Holmes once described life as "painting a picture." OLIVER W. HOLMES, JR., *The Class of '61*, *in* THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES, *supra* note 6, at 160, 161. He later suggested that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425 (1918). In connection with Holmes's penchant for visual metaphors, it is interesting to note that "he developed a religion of books," once again suggesting the link between visuality and attachment to the written word. Peter Gibian, *Opening and Closing the Conversation*, *in* THE LEGACY OF OLIVER WENDELL HOLMES, JR. 186, 214 (Robert W. Gordon ed., 1992).

[184] *See supra* note 6.

[185] *See* Henly, *supra* note 14, at 83. On other occasions, Holmes invited his interlocutors to envisage law as "a princess . . . eternally weaving into her web dim figures of the ever-lengthening past" (HOLMES, *supra* note 6, at 22), and to "look at [law] as [would] a bad man" (Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 407, 459 (1897)).

[186] *See generally* MICHAEL S. MACOVSKI, DIALOGUE AND LITERATURE: APOSTROPHE, AUDITORS, AND THE COLLAPSE OF ROMANTIC DISCOURSE (1994) (discussing the aurally evocative style of much Romantic prose and poetry).

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[187] On the largely eighteenth-century separation of written English style and syntax from spoken English style and syntax, see IAN A. GORDON, *The Reaction Against Speech*, *in* THE MOVEMENT OF ENGLISH PROSE 144 (1966).

[188] GEORGE KENNEDY, CLASSICAL RHETORIC AND ITS CHRISTIAN AND SECULAR TRADITION FROM ANCIENT TO MODERN TIMES 240 (1980); Ronald F. Reid, *The Boylston Professorship of Rhetoric and Oratory, 1806-1904: A Case Study in Changing Concepts of Rhetoric and Pedagogy*, 45 Q. J. SPEECH 239 (1959).

[189] *See generally* RICHARD SENNETT, THE FALL OF PUBLIC MAN 214-16 (1976) (discussing silence as a bourgeois mechanism for controlling the less literate working class).

[190] *See generally* JOHN HOLLANDER, THE UNTUNING OF THE SKY: IDEAS OF MUSIC IN ENGLISH POETRY, 1500-1700 (1961) (discussing the implications of this expulsion for the content and language of English verse).

[191]
> It is perhaps scarcely surprising that the dialogue of Ramus' age [the sixteenth century] should have tended away from true dialogue towards an elaborate monologue, turning its speakers from active protagonists into the custodians of a method elaborated, far from the clamour of their voices, by the writer's solitary pen.

VIRGINIA COX, THE RENAISSANCE DIALOGUE: LITERARY DIALOGUE IN ITS SOCIAL AND POLITICAL CONTEXTS, CASTIGLIONE TO GALILEO 104 (1992).

[192] *See generally id.* at 99-113.

[193] Prose had notably emerged as a European literary form around the time of the upsurge of literacy in the twelfth and thirteenth centuries. *See generally* WLAD GODZICH & JEFFREY KITTAY, THE EMERGENCE OF PROSE (1987). On the rising fortunes of prose in the early print era, see generally JANEL M. MUELLER, THE NATIVE TONGUE AND THE WORD: DEVELOPMENTS IN ENGLISH PROSE STYLE 1380-1580 (1984); GEORGE WILLIAMSON, THE SENECAN AMBLE: PROSE FROM BACON TO COLLIER (1951).

Law was inevitably caught up in the new antipathy to sound. Between the seventeenth and the nineteenth centuries, many traditional legal ceremonies in which aural declarations had reinforced visual or tactile gestures were either abandoned or reduced to the status of archaisms. In England, law showed noticeably less respect for customary property "rights" based only on oral tradition.[196] Judges increasingly refused to admit hearsay evidence.[197] In a society where the spoken word had lost a critical measure of its traditional power, slander (which had been taken very seriously right through the Middle Ages)[198] was increasingly marginalized as a legitimate cause of action.[199] Dialogues all but disappeared from legal literature.[200] Law finally dissolved its ancient relationship with poetry: Blackstone's *The Lawyer's Farewell to his Muse*,[201] a verse of dubious quality written in the early 1740s on the occasion of the future commentator's abandonment of poetry for law, is a rough but convenient marker of a broader historical transition.[202]

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[194] The English poet William Blake lamented what he considered to be the aural poverty of eighteenth- and early-nineteenth-century English poetry in these lines addressed to the ancient Muses:

> How have you left the ancient love
> That bards of old enjoy'd in you!
> The languid strings do scarcely move,
> The sound is forced, the notes are few.

Quoted in ERNST R. CURTIUS, EUROPEAN LITERATURE AND THE LATIN MIDDLE AGES 246 (Willard R. Trask trans., Harper & Row 1953) (1948).

[195] *See generally* JEAN H. HAGSTRUM, THE SISTER ARTS: THE TRADITION OF LITERARY PICTORIALISM AND ENGLISH POETRY FROM DRYDEN TO GRAY (1958). *See also supra* note 112.

[196] BOB BUSHAWAY, BY RITE: CUSTOM, CEREMONY AND COMMUNITY IN ENGLAND, 1700-1880 (1982); Peter King, *Gleaners, Farmers and the Failure of Legal Sanctions in England 1750-1850*, 125 PAST AND PRESENT 116 (1989).

[197] On the history of the hearsay rule, see 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 214-19 (1944); 5 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1364 (Chadbourn rev. ed., 1974).

[198] *See, e.g.*, CARL LINDAHL, EARNEST GAMES: FOLKLORIC PATTERNS IN THE CANTERBURY TALES 73-86 (1987); R. H. Helmholtz, *Introduction* to 101 THE PUBLICATIONS OF THE SELDEN SOCIETY: SELECT CASES ON DEFAMATION TO 1600, at xi (R. H. Helmholtz ed., 1985).

[199] From the late seventeenth century, slander plaintiffs were burdened by a requirement of proving "special damage" that did not apply to libel plaintiffs. ALAN HARDING, A SOCIAL HISTORY OF ENGLISH LAW 294 (1966).

[200] One of the last major works in this form is EDWARD WYNNE, EUNOMUS, OR DIALOGUES CONCERNING THE LAW AND CONSTITUTION OF ENGLAND (London, Benjamin White and Son 1775).

[201] *Reprinted in* LEWIS C. WARDEN, THE LIFE OF BLACKSTONE 48-52 (1938).

[202] Afterwards, poetry played no serious role in English law except as a mnemonic device for struggling law students. In 1742, for instance, one J. Worrall published a version of

The ancient and ailing system of aural lectures and exercises at the Inns of Court in London finally collapsed, leaving law students to learn most of their law from printed texts.[203]

In America, oral tradition had a significant impact on law and legal composition through the end of the eighteenth century;[204] when Thomas Jefferson wrote the Declaration of Independence in 1776, his draft contained marks indicating breaths and pauses appropriate to an oral reading of the document.[205] In the nineteenth century, however, oral practices and procedures fell out of legal favor. An early judicial indulgence of "unwritten" sources of constitutional authority based on broad contextual understandings of the Framers' intent soon gave way to a more strictly visual "textualism."[206] At mid-century, the United States Supreme Court began to limit time for oral argument, preferring to place more weight on written briefs.[207] Legal apprenticeship, which had traditionally been premised on the multisensory virtues of listening, observation, and discussion, was first transformed into an opportunity to read the master's books,[208] and then was largely abandoned in favor of a form of classroom instruction that revolved around the reading of appellate decisions and the writing of examinations.[209] Legal language reflected material change: by the end of the 1800s, the figurative references to "harmony" and "voice" that had once

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Sir Edward Coke's *Reports* done into verse; the text was republished in a second edition in 1825, and in a third edition in 1826. FREDERICK C. HICKS, MEN AND BOOKS FAMOUS IN THE LAW 81-82 (1921); Miller, *supra* note 72, at v-vi.

[203] DAVID LEMMINGS, GENTLEMEN AND BARRISTERS: THE INNS OF COURT AND THE ENGLISH BAR, 1680-1730, at 91-92 (1990).

[204] *See generally* A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS: CREATORS OF VIRGINIA LEGAL CULTURE 1680-1810 (1981). *See also* RHYS ISSAC, THE TRANSFORMATION OF VIRGINIA 1740-1790, at 91-92 (1982).

[205] JAY FLIEGELMAN, DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE AND THE CULTURE OF PERFORMANCE 4-15 (1993). Fliegelman astutely notes that the oral readings of the Declaration which Jefferson's markings overtly contemplated made it "an event rather than a document. They [i.e., the readings] gave it a voice, which . . . was experienced emotionally and responded to vocally. Read out loud, the document that denounced a false community would galvanize the bond of a true one." *Id.* at 26.

[206] *See* Grey, *supra* note 63; Suzanna Sherry, *The Early Virginia Tradition of Extra-Textual Interpretation*, 53 ALB. L. REV. 297 (1989); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); Sylvia Snowiss, *From Fundamental Law to the Supreme Law of the Land: A Reinterpretation of the Origin of Judicial Review*, 2 STUD. AM. POL. DEV. 1 (1987).

[207] *See* Stephen M. Shapiro, *Oral Arguments in the Supreme Court: The Felt Necessities of the Time*, 1985 SUP. CT. HIST. SOC. Y.B. 22.

[208] *See generally* Charles R. McKirdy, *Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts*, 28 J. LEGAL EDUC. 124 (1977).

[209] *See* ROBERT STEVENS, *Harvard Sets the Style, in* LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s, at 50 (1983).

been scattered through the pages of the *Federalist Papers*[210] and the works of legal luminary Joseph Story[211] were largely gone. Metaphorically, at least, American law fell all but silent.

Contemporary America is heir to both the technology and the sensory bias of the recent past. Despite numerous signs that both our facility and our comfort with writing are declining,[212] the United States is still one of the most print-saturated and print-oriented nations on earth. Our continued cultural dependence on the written word undergirds our own visuality as I have described it—a visuality that today is supported (even if, in the process, it is being transformed) by such new "visual" technologies as motion pictures, television, and computers. In this context, the visualist legal language that our culture has spawned and still sustains may ultimately be regarded as one of the most powerful, if also one of the least recognized, legacies of writing.

B. *Visuality and Power*

The traditional visuality of American legal metaphor has, however, been more than just a function of general cultural circumstance. It has also been the product of power: the power of American men over women, the power of American whites over blacks, the power of American "Anglos" over Hispanics, and the power of American Protestants over Catholics and Jews. By making special use of the written word to secure or extend their cultural authority, members of the former groups have gained a special respect for vision and the visual that they have unilaterally made the standard for "American" culture as a whole. In conditions where their literacy has been involuntarily restricted or their own traditions have set limits to their trust of writing, members of the latter groups have either been forced or have chosen to grant relatively more respect to aural expression and experience.[213] As American men, whites, Anglos, and Protestants have used their cultural authority to first monopolize, and then numerically and politically dominate the ranks of the American legal profession, they and those whom they have coerced or co-opted have indulged their visuality in, among other things, a consistent preference for visual legal metaphor. They have literally shaped American legal language in their own images.

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[210] For a list of the eight references to "harmony" in the *Federalist Papers*, see THE FEDERALIST CONCORDANCE 237 (Thomas S. Engeman et al. eds., 1980). For a list of the 21 references to "voice" or "voices," see *id.* at 596. But see also the relatively more abundant references to "enlightened" (23); "eye" or "eyes" (25); "reflect," "reflected," "reflecting," "reflection," or "reflections" (45); "light" or "lights" (46); "observation" or "observations" (78); and "view," "viewed," "viewing," or "views" (168). *Id.* at 166, 190, 303-04, 359, 454, 593-94.

[211] *See, e.g.*, 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 387 (Da Capo Press 1970) (1833) [hereinafter COMMENTARIES] (declaring that in constitutional interpretation, "[w]here the words admit of two senses . . . that sense is to be adopted, which . . . best harmonizes with the nature and objects . . . of the instrument"); JOSEPH STORY, *Course of Legal Study*, *in* MISCELLANEOUS WRITINGS OF JOSEPH STORY 69 (William W. Story ed., Da Capo Press 1972) (1852) (referring to maritime law as exhibiting a "harmony of principles"); JOSEPH STORY, *Value and Importance of Legal Studies*, *in* MISCELLANEOUS WRITINGS OF JOSEPH STORY, *supra*, at 504 (referring to the "harmony of civil society"); *see also* 3 COMMENTARIES, *supra*, at 754 (declaring that "our constitutions of government . . . are to speak in the same voice now, and for ever").

[212] As to our facility, "something in excess of 60 million Americans are wholly or functionally illiterate." Jeremy Murray-Brown, *Video Ergo Sum*, *in* VIDEO ICONS & VALUES 17, 19 (Alan M. Olson et al. eds., 1991). As to our comfort, it has been noted repeatedly that "increasing numbers of undergraduate students simply do not enjoy reading any more." Alan M. Olson, *Video Icons and Values: An Overview*, *in* VIDEO ICONS & VALUES, *supra*, at 1, 3.

Generalizing about the circumstances or perspectives shared by the members of any group is a risky business. One must steer between the Scylla of "essentialism" and the Charybdis of "anti-essentialism," recognizing on the one hand that individuals falling into a single category may, as individuals, be different in many respects,[214] while acknowledging on the other hand that diverse individuals sharing a particular identity may, fortunately or unfortunately, have had similar experiences or developed similar views by virtue of that identity or society's reaction to it.[215] In this portion of the Article, I nonetheless focus on differences between groups more than on differences between individuals because I fear that following the latter course would compromise our appreciation of important power relationships that have historically operated for and against certain Americans by virtue of their gender, racial, ethnic, and religious associations. Here I should stress a point I previously made in passing:[216] the group generalizations to be discussed are strictly limited by being contingent constructs of culture, not inevitable incidents of biology. They moreover illustrate differences of degree, rather than of kind. They reveal, if you like, human differences mediated by human sameness.[217] Keeping all this in mind, I will spend the next few pages exploring how greater exposure to, dependence on, and even literal faith in writing have traditionally encouraged some American groups to embrace visuality more enthusiastically than have others. I will then examine how the members of these former groups have imposed their visuality on American legal culture and, in that course, on American legal language.

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[213] Explicit reference in this paragraph to a select number of less visually biased, relatively more aurally oriented American groups (and the discussion of them below) is not meant to deny the existence of other groups fitting the same description for the same reasons, such as Native Americans and, less obviously, Asian Americans. *See, e.g.*, SMOOTHING THE GROUND: ESSAYS ON NATIVE AMERICAN ORAL LITERATURE (Brian Swann ed., 1983) (discussing the significance and manifestations of oral tradition in Native American societies); Linda C. Sledge, *Oral Tradition in [Maxine Hong] Kingston's China Men*, *in* REDEFINING AMERICAN LITERARY HISTORY 142 (A. LaVonne Brown Ruoff & Jerry W. Ward, Jr. eds., 1990) (discussing the significance of aurality in Asian American culture). Members of the latter groups, however, have had even less opportunity than members of the groups mentioned in the text to influence American legal thought and legal language. To consider them at length now would not significantly advance or affect the argument I will eventually offer on the relationship between aural cultural traditions and the use of aural legal metaphors.

[214] For instances of legal scholarship emphasizing differences between individuals in the same group, see Nitya Duclos, *Lessons of Difference: Feminist Theory on Cultural Diversity*, 38 BUFF. L. REV. 325 (1990) (considering women); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1778-87 (1989) (considering people of color).

[215] For an instance of legal (feminist) scholarship emphasizing similarities between individuals based on shared group membership, see Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25 (1990).

I begin with the observation that American men's culture has traditionally enjoyed a closer, more intense association with the written word than has the culture comprised of American women.[218] This was true from the earliest days of the republic.[219] Many American men absorbed the finer points of reading, writing, and literate learning as youngsters in grammar schools and universities which for a long time were open only to them. As adults, a good number engaged in businesses or professional callings (most of which, again, were open only to men) that required them to spend some portion of the day reading or writing correspondence, contracts, or other texts. Into the twentieth century, American men frequently assumed responsibility at home for reading such standard writings as the Bible and the newspaper aloud to female members of their families. Today some American feminists still consider the written word—at least in its traditional semantic and syntactic incarnations—to be fundamentally "male."[220]

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[216] *See supra* note 80.

[217] On the particular danger of group-based "differences of kind" being exploited for prejudicial or discriminatory purposes, see Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 818 n.69 (1993); *see also* Kennedy, *supra* note 214, at 1816-18.

[218] This is patently not to say, however, that individual American men have uniformly been more writing-oriented than individual American women, or that men have uniformly been more writing-oriented than women in particular American communities. For a study of two contemporary Southern towns in which women are more writing-oriented than men, see SHIRLEY B. HEATH, WAYS WITH WORDS: LANGUAGE, LIFE AND WORK IN COMMUNITIES AND CLASSROOMS (1983). *See also* Anita Puckett, *"Let the Girls Do the Spelling and Dan Will Do the Shooting": Literacy, the Division of Labor, and Identity in a Rural Appalachian Community*, 65 ANTHROPOLOGICAL Q. 137 (1992).

[219] "[I]t is indisputable that literateness (in the fullest sense of the term) was more valued, encouraged and achieved in early America by men than by women." CATHY N. DAVIDSON, REVOLUTION AND THE WORD: THE RISE OF THE NOVEL IN AMERICA 61 (1986).

It may be argued that the extent of their involvement with written material has led American men as a group—like men in other Western societies—to take a great interest in the phenomenon of visual observation that has been the source of so much of their textual knowledge and authority.[221] As modern feminist scholarship has taken pains to emphasize (if not necessarily explain), the "gaze" has historically been more of a "male" than a "female" medium.[222] In the American tradition, men have been primarily responsible for reducing the world—and, in the process, women—to visual, two-dimensional texts, paintings, photographs,[223] electronic images,[224] diagrams, and equations.[225] In their

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[220] One feminist solution to the perceived "maleness" of writing has been to consciously disrupt traditional syntactic forms and "rewrite" the dictionary (on which written language is based) so as to accommodate the hitherto unarticulated or semantically suppressed realities of women's lived experience. *See, e.g.*, MARY DALY, GYN/ECOLOGY: THE METAETHICS OF RADICAL FEMINISM (1978); *see also* MARY DALY, WEBSTER'S FIRST NEW INTERGALACTIC WICKEDARY OF THE ENGLISH LANGUAGE (1987).

[221] In Western societies, "[s]exual dominance is . . . intimately related to visual dominance." David Howes, *Sensorial Anthropology*, *in* VARIETIES, *supra* note 48, at 167, 189; *see also* ARTHUR KROCKER, SPASM: VIRTUAL REALITY, ANDROID MUSIC AND ELECTRIC FLESH 49 (1993) ("[T]he eye has a penis. It is a privileged organ of the male sex . . . .").

[222] Lorraine Gamman & Margaret Marshment, *Introduction* to THE FEMALE GAZE: WOMEN AS VIEWERS OF POPULAR CULTURE 1 (Lorraine Gamman & Margaret Marshment eds., 1989); Catherine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 636 (1983); Laura Mulvey, *Visual Pleasure and Narrative Cinema*, *in* VISUAL AND OTHER PLEASURES 14 (1989). Most recently, and more abstractly, see DANA C. JACK, SILENCING THE SELF: WOMEN AND DEPRESSION 94, 108-27 (1991) (positing the existence of a moral "Over-Eye" that represents patriarchal notions of what is "good" and "right" for women).

[223] Contemporary feminist opposition to pornography is at least partly based on the fact that it is purely visual, disconnected from any other form of sensory engagement:

> The man who stares at a photograph of a nude woman is a voyeur. He can look freely and turn away when he wishes. He can run his hands over the two-dimensional surface, but he will not be touched. He can know the body of a woman, and yet encounter a knowledge that will not change him . . . .

SUSAN GRIFFIN, PORNOGRAPHY AND SILENCE: CULTURE'S REVENGE AGAINST NATURE 34 (1981); *see also* SONTAG, *supra* note 48, at 24 ("The knowledge gained through still photographs will always be . . . a semblance of knowledge, a semblance of wisdom; as the act of taking pictures is a semblance of wisdom, a semblance of rape. The very muteness of what is, hypothetically, comprehensible in photographs is what constitutes their attraction and provocativeness."). This feminist critique of visuality has recently been extended to embrace the now famous photograph of the whole Earth taken from space. *See* Yaakov J. Garb, *Perspective or Escape? Ecofeminist Musings on Contemporary Earth Imagery*, *in* REWEAVING THE WORLD: THE EMERGENCE OF ECOFEMINISM 264 (Irene Diamond & Gloria F. Orenstein eds., 1990). "[T]he whole earth image," writes Garb in language that purposefully evokes Sontag's, "has no *telling*: it is verb-less, a snapshot, a single frozen capacities as school administrators, college professors, historians, curators, and archivists, American men have long been in charge of preserving and perpetuating the corpus of American visual culture over time. As scientists and philosophers, they have further indulged their visuality by using mostly visual metaphors to describe the central intellectual operations of thinking and knowing: they have made "observations," offered "perspectives," and "speculated" on the nature of reality.[226]

The desire and even the need to look that has animated American male experience has frequently been coupled with a limited and somewhat selective devaluation of aurality and evocatively aural forms. At least since the late eighteenth century, most American men have rejected dialogue and story as respectable vehicles for the communication of important written information.[227] More generally, American men as a group have been eager to prescribe silence as a positive personal and social value for others, if not necessarily for themselves.[228] This latter strategy has been feasible in part because many American men have had access to a visual medium of communication (writing) which in their experience has not depended on sound to provide its sense. The strategy has moreover been politically useful because it has enabled American men to consolidate their control of other groups that have been more dependent on aural expression. The command that women (not to mention children) be "seen and not heard"—implicitly evoked from the anti-scolding laws of the seventeenth century[229] through

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instant. . . . It is not farfetched to call this image the *magnum opus* of patriarchal consciousness." *Id.* at 267, 275.

[224] *See* Rosalind P. Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*, 13 FEMINIST STUD. 263 (1987).

[225]
> In most popular representations it seems that men look and women are looked at. In film, in television, in the press and in most popular narratives men are shown to be in control of the gaze, women are controlled by it. Men act; women are acted upon. This is patriarchy.

Gamman & Marshment, *supra* note 222, at 1.

[226] *See* Keller & Grontworski, *supra* note 87.

[227] Thus, Linda Greene's initial concern about the reception that Derrick Bell's dialogically structured *Chronicles* would get from traditional (and mostly male) legal academics: "After all, some would say, isn't it a bit contrived to discuss a subject as important as equality through conversations . . . [?]" Linda Greene, *A Short Commentary on the Chronicles*, 3 HARV. BLACKLETTER J. 60, 62 (1986).

[228] Studies have indeed suggested that men talk more than women in a variety of different settings. *See generally* Deborah James & Janice Drakich, *Understanding Gender Differences in Amount of Talk: A Critical Review of Research*, *in* GENDER AND CONVERSATIONAL INTERACTION 281 (Deborah Tannen ed., 1993).

[229] SUSAN BROWNMILLER, FEMININITY 113 (1984).

the marital evidence laws of the nineteenth century[230]—has been a prime guarantor of patriarchal power.

Over the course of American history, many American women learned how to read and write during childhood, but well into this century most spent their adult lives segregated in the home. Surrounded there in close quarters by nonliterate infants, semiliterate children, and other women, they had limited incentive and limited opportunity to use or develop their own literate skills.[231] During the colonial period, what American women wanted or needed to know to run their households was generally not written down.[232] In the years immediately following the Revolution, "republican mothers" were encouraged to do more reading for the sake of their children's good moral upbringing.[233] In the nineteenth and twentieth centuries, many American women read books and popular magazines for their own instruction and diversion, organized and joined reading clubs and literary societies,[234] established public libraries, and actively (if somewhat surreptitiously) participated in literary culture by writing letters and diaries;[235] an eclectic minority even overcame the "anxiety of authorship"[236] and wrote for general publication. Given restricted access to higher education,[237] textual materials, and publishing technology—not to mention a proverbial male aversion to women who have worn the optical aids frequently necessary for full participation in a visualist society[238]—the visuality of American women's culture has nonetheless been qualified. The failure of the available male-dominated visual media to adequately address women's concerns or women's reality has only ensured that unmediated looking has not been as important or meaningful to American women as a group, as it has been to American men as a group.[239]

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[230] Lucie E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1, 12 (1990).

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> Most eighteenth- and nineteenth-century women lived within a world bounded by home, church, and the institution of visiting—that endless trooping of women to one another's homes for social purposes. It was a world inhabited by children and other women. Women helped one another with domestic chores and in times of sickness, sorrow, or trouble. Entire days, even weeks, might be spent exclusively with other women. Urban and town women could devote virtually every day to visits, teas, or shopping trips with other women. Rural women developed a pattern of more extended visits that lasted weeks and sometimes months . . . .

CARROLL SMITH-ROSENBERG, DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 61 (1985).

[232] RICHARD D. BROWN, KNOWLEDGE IS POWER: THE DIFFUSION OF INFORMATION IN EARLY AMERICA, 1700-1865, at 162 (1989).

[233] *Id.* at 165.

[234] *See generally* THEODORA P. MARTIN, THE SOUND OF OUR OWN VOICES: WOMEN'S STUDY CLUBS 1860-1910 (1987).

[235] BROWN, *supra* note 232, at 167-81; Barbara Sicherman, *Sense and Sensibility: A Case Study of Women's Reading in Late-Victorian America*, *in* READING IN AMERICA: LITERATURE AND SOCIAL HISTORY 201 (Cathy N. Davidson ed., 1989).

[236] On how this anxiety burdened women who, by writing, proposed to enter a primarily male preserve and in so doing proposed to dissociate themselves from their own bodies and their own culture, see SANDRA M. GILBERT & SUSAN GUBAR, THE MADWOMAN IN THE ATTIC: THE WOMAN WRITER AND THE NINETEENTH CENTURY LITERARY IMAGINATION 3-16 (1979).

[237] *See generally* BARBARA M. SOLOMON, IN THE COMPANY OF EDUCATED WOMEN: A HISTORY OF WOMEN AND HIGHER EDUCATION IN AMERICA (1985).

In this context, American women's culture has been relatively more dependent on, or at least relatively more respectful of, aural modes of communication. Compared to men, American women as a group have historically shared a greater proportion of their knowledge, experiences, and thoughts with one another by talking and listening,[240] telling stories,[241] and engaging in the intimate, detailed dialogue that men have pejoratively called "gossip."[242] As readers and writers, American women have traditionally tended to favor forms of literature (such as the novel and poetry) that have featured or strongly evoked the human voice.[243] The extent to which American women still define and experience their lives in aural terms is evident in the emphasis that contemporary American feminists place on women's talk (especially "consciousness raising") as a technique of validation and empowerment,[244] and on actual silence (or "silencing") as a form of oppression.[245] It is also apparent in the prominence of oral history in feminist studies,[246] in the tenor of feminist art history which rejects the notion of art as a purely visual experience unmediated by language,[247] in the contin-

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[238] "Men don't make passes at girls who wear glasses."

[239] Compare the words of feminist Luce Irigaray, speaking from the somewhat analogous perspective of twentieth-century France: "Investment in the look is not privileged in women as in men." *Quoted in* Craig Owens, *The Discourse of Others: Feminists and Postmodernism*, *in* THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE 70 (Hal Foster ed., 1983); *see also* Luce Irigaray, *The Sex Which Is Not One*, *in* NEW FRENCH FEMINISMS: AN ANTHOLOGY 99, 101 (Elaine Marks & Isabelle de Courtivron eds., 1980) ("Woman's desire . . . does not speak the same language as man's desire . . . . In this logic, the prevalence of the gaze . . . is particularly foreign . . . .").

[240] On talk or "dialogue" as "the essence of friendship" among American women, see DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: MEN AND WOMEN IN CONVERSATION 80, 85 (1990); Carl S. Becker, *Friendship Between Women: A Phenomenological Study of Best Friends*, 18 J. PHENOMENOLOGICAL PSYCHOL. 59 (1987). On talk as the primary medium by which women have passed on significant bodies of scientific, as well as personal, information (concerning, for instance, the practice of midwifery), see Ruth Ginzberg, *Uncovering Gynocentric Science*, *in* FEMINISM & SCIENCE 69, 74-75 (Nancy Tuana ed., 1989).

[241] On women's storytelling and storytelling strategies, see Barbara Bate, *Themes and Perspectives in Women's Talk*, *in* WOMEN COMMUNICATING: STUDIES OF WOMEN'S TALK 303 (Barbara Bate & Anita Taylor eds., 1988); Deanna L. Hall & Kristin M. Langellier, *Storytelling Strategies in Mother-Daughter Communication*, *in* WOMEN COMMUNICATING: STUDIES OF WOMEN'S TALK, *supra*, at 107; Susan Kalčik, "*. . . like Ann's gynecologist or the time I was almost raped": Personal Narratives in Women's Rap Groups*, *in* WOMEN AND FOLKLORE 3 (Claire R. Farrer ed., 1975); Michael Presnell, *Narrative Gender Differences: Orality and Literacy*, *in* DOING RESEARCH ON WOMEN'S COMMUNICATION: PERSPECTIVES ON THEORY AND METHOD 118 (Kathryn Carter & Carole Spitzack eds., 1989). The particular association of storytelling with women in the Euro-American tradition notably goes back to the seventeenth century when rapidly increasing levels of male literacy left women largely responsible for continuing the oral traditions of Western culture. PETER BURKE, POPULAR CULTURE IN EARLY MODERN EUROPE 51 (1978).

[242] On the role of gossip in women's culture, see TANNEN, *supra* note 240, at 96-122; Mary E. Brown, *Soap Opera and Women's Culture: Politics and the Popular*, *in* DOING RESEARCH ON WOMEN'S COMMUNICATION: PERSPECTIVES ON THEORY AND METHOD,

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supra note 241, at 161, 175-77; Deborah Jones, *Gossip: Notes on Women's Oral Culture*, 3 WOMEN'S STUD. INT'L Q. 193 (1980).

[243] On the popularity of novels with American women in the eighteenth and early nineteenth centuries in particular, see DAVIDSON, *supra* note 219, at 112-25; *see also* BROWN, *supra* note 232, at 195-96. To some extent, women during this period may have preferred novels because they had limited access to other forms of printed matter. At the same time, novels—many of which revolved around female characters—had a special appeal to female readers insofar as they enabled them to feel "part of a community and tradition of women who talk well about their lives and link them, by language, to larger subjects." RACHEL M. BROWNSTEIN, BECOMING A HEROINE: READING ABOUT WOMEN IN NOVELS 24 (1982).

[244] "Many women report feelings of craziness when their own experience fails to comport with the dominant theory of what they should feel. The way out of this craziness is talk with other women about women's experience. This talk, or consciousness raising, has taught women several things." Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613, 620-21 (1986) (footnotes omitted); *see also* Catherine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 7 SIGNS 515, 536 (1982).

[245] See, for example, King-Kok Cheung, *"Don't Tell": Imposed Silences in* The Color Purple *and* The Woman Warrior, 103 PUB. MOD. LANGUAGE ASS'N 162 (1988) and other examples cited therein. For a brief discussion of the feminist literature of silencing, see West, *supra* note 21, at 67-75.

[246] "If cultural historians are to construct a fully inclusive and historically accurate picture of . . . women's creative heritage . . . we will need to look . . . to sources outside writing itself, to the traditions of the spoken arts." Jean H. Humez, *"We Got Our History Lesson": Oral Historical Autobiography and Women's Narrative Art Traditions*, *in* TRADITION AND THE TALENTS OF WOMEN 125, 125 (Florence Howe ed., 1991); *see also* WOMEN'S WORDS: THE FEMINIST PRACTICE OF ORAL HISTORY (Sherna B. Gluck & Daphne Patai eds., 1991); Kathryn Anderson et al., *Beginning Where We Are: Feminist Methodology in Oral History*, *in* FEMINIST RESEARCH METHODS: EXEMPLARY READINGS IN THE SOCIAL SCIENCES 94 (Joyce M. Nielsen ed., 1990). For recent examples of women's oral histories, see KATHLEEN CASEY, I ANSWER WITH MY LIFE, LIFE HISTORIES OF WOMEN TEACHERS WORKING FOR SOCIAL CHANGE (1993); GWENDOLYN ETTER-LEWIS, MY SOUL IS MY OWN: ORAL NARRATIVES OF AFRICAN-AMERICAN WOMEN IN THE PROFESSIONS (1993); JULIE JONES-EDDY, HOMESTEADING WOMEN: AN ORAL HISTORY OF COLORADO, 1890-1950 (1992); PATRICIA P. MARTIN, SONGS MY MOTHER SANG TO ME: AN ORAL HISTORY OF MEXICAN-AMERICAN WOMEN (1992); MARY ROTHSCHILD, DOING WHAT THE DAY BROUGHT: AN ORAL HISTORY OF ARIZONA WOMEN (1992).

[247] Griselda Pollock, *Trouble in the Archives: Introduction*, 4 DIFFERENCES at iii, iv (1992). Note also the prominence of "ear-as-subject" in the works of feminist artist Mira

uing popularity of women's "reading groups" whose members discuss and sometimes even read aloud portions of selected texts,[248] in women's complementary experiments in "dialogic" or "collective" writing,[249] and in the pointedly personal, consciously conversational style of much feminist scholarship.[250]

Most important for present purposes, however, the relative aurality of American women's culture is reflected in the aural metaphors American women often choose to define themselves, their condition, and their world. Psychologist Mary Field Belenky and her colleagues recently noted that

> [i]n describing their lives [to us], women commonly talked about voice and silence: "speaking up," "speaking out," "being silenced," "not being heard," "really listening," "really talking," "words as weapons," "feeling deaf and dumb," "having no words," "saying what you mean," "listening to be heard," and so on in an endless variety of connotations . . . . We found that women repeatedly used the metaphor of voice to depict their intellectual and ethical development . . . .[251]

Schor. *See generally* PEGGY PHELAN, UNMARKED: THE POLITICS OF PERFORMANCE 51-60 (1993).

[248] *See, e.g.,* RACHEL W. JACOBSOHN, THE READING GROUP HANDBOOK 5, 17, 55 (1994); Elizabeth Long, *Textual Interpretation as Collective Action*, *in* THE ETHNOGRAPHY OF READING 180, 196-203 (Jonathan Boyarin ed., 1992); Elizabeth Long, *Women, Reading, and Cultural Authority: Some Implications of the Audience Perspective in Cultural Studies*, 38 AM. Q. 591 (1986) [hereinafter Long, *Women, Reading, and Cultural Authority*]. As Long's work emphasizes, reading groups are not now, nor have they ever been, an exclusively female enterprise. Contemporary American men nonetheless seem to be less attracted to them despite the precedents for such groups in the history of American and European men's culture (ranging backwards from the "correspondence societies" of nineteenth-century male artisans, to the eighteenth-century English coffeehouses, to the medieval monasteries which featured vocal readings of scripture during communal meals).

[249] CHERIS KRAMARAE, WOMEN AND MEN SPEAKING: FRAMEWORKS FOR ANALYSIS 15-16 (1981).

[250] Elisabeth Young-Bruehl, *Pride and Prejudice: Feminist Scholars Reclaim the First Person*, LINGUA FRANCA, Feb. 1991, at 15.

[251] MARY F. BELENKY ET AL., WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE AND MIND 18 (1986); *see also* JACK, *supra* note 222, at 30-37 (describing loss of "voice" as women's metaphoric equivalent for loss of "self"); Elizabeth Bernstein & Carol Gilligan, *Unfairness and Not Listening: Converging Themes in Emma Willard Girls' Development*, *in* MAKING CONNECTIONS: THE RELATIONAL WORLDS OF ADOLESCENT GIRLS AT EMMA WILLARD SCHOOL 147 (Carol Gilligan et al. eds., 1990) (discussing the use of "not listening" as a metaphorical expression for "unfairness" in the language of eleventh- and twelfth-grade girls in a private girls' school in New York State).

In another recent study, Lyn Mikel Brown and Carol Gilligan have noted the tendency of American adolescent girls to draw more visual metaphors into their speech just as they are entering their first romantic relationships with boys who bring with them the visualist biases of American men's culture. *See* LYN M. BROWN & CAROL GILLIGAN, MEETING AT THE CROSSROADS 167, 184, 210-12 (1992). Elizabeth Long has also noted how women in reading groups tend to be drawn towards visual metaphors, which "seems to support Ong's

More than a mere matter of conversational idiom, aural metaphors have also been strikingly prominent in the language of some of America's most accomplished female scientists. Barbara McClintock, a Nobel laureate in genetics and cytology whose scientific *modus operandi* has been described by her biographer as an exemplar of gendered "difference," repeatedly described the task of a scientist not just as "looking at hypotheses," but also "listening to the [research] material."[252] Understanding required the scientist to "let the experiment tell you what to do."[253] Nature was thus envisaged as a speaker; in relating to nature, the scientist was not merely an observer, but also a hearer.[254] Biologist Rachel Carson drew on the same notion of a speaking nature in her famous book *Silent Spring*, where "silence" was not only a literal fact, but a metaphor for the destruction of the ecosystem. Most recently, aural metaphorical language has been picked up and amplified in a wide variety of feminist writings[255] which have explicitly and implicitly

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claim that the increasing influence of the written word in our culture has privileged the visual . . . over the oral/aural in the human sensorium." Long, *Women, Reading, and Cultural Authority*, *supra* note 248, at 605.

[252] EVELYN F. KELLER, *A World of Difference*, *in* REFLECTIONS ON GENDER AND SCIENCE 158, 162, 176 (1985).

[253] *Id*. at 162. Compare the words of biophysicist Cynthia Haggerty, quoted in LINDA J. SHEPHERD, LIFTING THE VEIL: THE FEMININE FACE OF SCIENCE 83 (1993) ("What does this material tell me about the life process and about whatever pathology is going on?"). In a similar metaphoric vein, cancer researcher Sigrid Myrdal has characterized her scientific approach as "just sort of listening—just listening, without knowing how you're listening." *Id.* at 84.

[254] In this context, it is interesting to note that traditional, male-generated, scientific language labels irrelevant data "noise," metaphorically suggesting the undesirability, or at least the extraneous nature, of hearing and things heard.

[255] *See, e.g.*, Nancy S. Love, *Politics and Voice(s): An Empowerment/Knowledge Regime*, 3 DIFFERENCES 85, 90 (1991) ("[A]s feminist theorists approach an extra-foundationalist, or political, epistemology, vocal metaphors become increasingly prominent in their work."); Rosanne Traficante, Breaking the Silence: The Voice Metaphor, a Statement of Self-Identity and Education (1993) (unpublished Ed.D. dissertation, Rutgers University). The most famous feminist work to feature aural metaphors is undoubtedly CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). More recently, see Carol Gilligan et al., *Epilogue: Soundings into Development*, *in* MAKING CONNECTIONS: THE RELATIONAL WORLDS OF ADOLESCENT GIRLS AT EMMA WILLARD SCHOOL, *supra* note 251, at 314 (using metaphors from music—"theme," "counterpoint," "fugue," and "plainsong"—as vehicles for discussing adolescent girls' psychology). On the level of title alone, without extending the list to include the plethora of feminist works that employ aural metaphors in their content, see also CLAUDIA BEPKO & JO-ANN KRESTAN, SINGING AT THE TOP OF OUR LUNGS: WOMEN, LOVE AND CREATIVITY at xv (1993) (in which the authors pointedly reject a visual metaphor for female fulfillment—a woman smiling—in favor of the aural metaphor of a women singing); CRIES OF THE SPIRIT: A CELEBRATION OF WOMEN'S SPIRITUALITY (Marilyn Sewell ed., 1991); STEPHANIE DEMETRAKOPOULOS, LISTENING TO OUR BODIES: THE REBIRTH OF FEMININE WISDOM (1983); BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK

sought to evoke a sense-reality intimately familiar to most American women from their own personal and cultural experience.[256]

Somewhat analogously to the relative circumstances of American men's and women's culture, white American culture has historically been more dependent on the written word than has African American culture. The first white American colonists came from European countries that by the seventeenth century had already developed significant textual traditions.[257] The first white American settlements were themselves creatures of authoritative writings—royal charters or (in the case of the Pilgrims) the Mayflower Compact. Learning to read was a hallmark of white American education from its beginning.[258] Over the years, literacy and familiarity with a wide range of written materials gradually encouraged the white American community to privilege sight and seeing. Through the lens of books and newspapers, tracts and magazines, its members learned to literally look out at the world; they conveniently came to regard texts and paintings as primary measures of cultural worth. Thus was born the phenomenon that some African American intellectuals have pejoratively, if accurately, labelled the "white gaze."[259]

In favoring the visual, white American culture did not reject aurality completely.[260] For instance, for a long while the culture

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(1989); RITA C. MANNING, SPEAKING FROM THE HEART: A FEMINIST PERSPECTIVE ON ETHICS (1992); MANUELA D. MASCETTI, THE SONG OF EVE (1990) (discussing goddesses and religious aspects of feminism); KATHLEEN NOBLE, THE SOUND OF A SILVER HORN: RECLAIMING THE HEROISM IN CONTEMPORARY WOMEN'S LIVES (1994); TO SPEAK OR BE SILENT: THE PARADOX OF DISOBEDIENCE IN THE LIVES OF WOMEN (Lena B. Ross ed., 1993). On the related aural phenomenon of "dialogue" as a recurrent metaphor of power relationships in feminist writing, see Alice Templeton, *The Dream and the Dialogue: Rich's Feminist Poetics and Gadamer's Hermeneutics*, 7 TULSA STUD. WOMEN'S LIT. 283 (1988).

[256] Having said this, I do not wish to imply that feminist metaphors have been uniformly aural. A variety—"lifting the veil," "removing the blindfold," or "looking behind the mirror," used as figures of empowerment, or "invisibility," used as a figure of disempowerment—have been strikingly visual. Visual metaphors nonetheless seem to fill a less distinctive role in feminist rhetoric.

[257] *See* GRAFF, *supra* note 117, at 108-72.

[258] On the extent and impact of literacy instruction in colonial American schools, see LAWRENCE CREMIN, AMERICAN EDUCATION: THE COLONIAL EXPERIENCE 1607-1783 (1970); KENNETH LOCKRIDGE, LITERACY IN COLONIAL NEW ENGLAND 57-69 (1974).

[259] *See, e.g.*, Cornel West, *West of Righteous: Anders Stephanson Talks with Cornel West*, ARTFORUM, Feb. 1994, at 66, 104.

[260] On the significance of aurality and oral communication in eighteenth- and nineteenth-century (white) America, see BROWN, *supra* note 232; WARNER, *supra* note 176, at 21-29; Harry S. Stout, *Religion, Communications, and the Ideological Origins of the American Revolution*, 34 WM. & MARY Q. 519 (1977).

continued to produce, trust, and even revere great speakers.[261] From the mid- to late nineteenth century, however, as white Americans approached "universal" literacy under the impetus of new developments in printing technology,[262] many seemed less confident in what they said or heard. Within the white community, public speech became more dependent on visual, written scripts;[263] old-fashioned oratory was increasingly dismissed as "mere rhetoric."[264] Storytelling survived, but it was largely, if not altogether accurately, associated with children, members of less literate lower classes, and inhabitants of backward rural areas. Most white American authors jettisoned the more obvious aural mannerisms and formats that had characterized so much American literature in the antebellum era.[265] At the same time, white Americans gradually embraced silence as both a social norm and a primary means of social discipline. Increasingly used to sitting quietly in front of texts, white American theater- and concert-goers who had formerly been inclined to spontaneously talk to each other and interact with stage performers[266] became more willing to sit in silent (or at least suspended) judgment on the musicians and actors who appeared before them.[267] In the schoolroom where white American teachers had once taught their students to read by recitation, the most important meta-lesson became, as it today remains, how to sit, write, and read in contented quiet.[268]

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[261] On eighteenth- and nineteenth-century (white) American oratory, see BARNET BASKERVILLE, THE PEOPLE'S VOICE: THE ORATOR IN AMERICAN SOCIETY (1979). *See also* A HISTORY AND CRITICISM OF AMERICAN PUBLIC ADDRESS (William N. Brigance ed., 1943).

[262] *See* GRAFF, *supra* note 117, at 340-72.

[263] In 1875, E.L. Godkin, the editor of the influential periodical *Nation*, observed that "[e]veryone . . . knows what the 'great speech' of the average Congressman has become. It is usually a diffuse written essay, full of quotations, often far-fetched and sometimes absurd, which he expects few people to listen to, and only lets off that he may get it printed." *Quoted in* BASKERVILLE, *supra* note 261, at 90.

[264] Barnet Baskerville, *19th Century Burlesque of Oratory*, 20 AM. Q. 726, 726 (1968); Barnet Baskerville, *Principal Themes of Nineteenth-Century Critics of Oratory*, 19 SPEECH MONOGRAPHS 11 (1952).

[265] On the "declamatory" nature and style of much antebellum American literature, see DANIEL J. BOORSTIN, *A Declamatory Literature, in* THE AMERICANS: THE NATIONAL EXPERIENCE 307 (1965). For a discussion of how oral practices and conventions shaped one famous antebellum literary work, see John G. Bayer, *Narrative Techniques and the Oral Tradition in* The Scarlet Letter, 52 AM. LITERATURE 250 (1980). It should not be assumed, however, that white American authors completely disregarded or denigrated aurality in the years after the Civil War. *See, e.g.*, BARRY SANDERS, A IS FOR OX: VIOLENCE, ELECTRONIC MEDIA, AND THE SILENCING OF THE WRITTEN WORD 209-24 (1994) (discussing Mark Twain's sympathetic if caricatured and occasionally condescending treatment of orality in *The Adventures of Huckleberry Finn*); Thomas D. Zlatic, *The "Seeing Eye" and the "Creating Mouth": Literacy and Orality in Mark Twain's Joan of Arc*, 21 CLIO 285 (1992); Larry D. Griffin, Orality in the Poetry of Walt Whitman (1989) (unpublished Ph.D. dissertation, University of Oklahoma) (on file with author).

[266] JOHN F. KASSON, RUDENESS AND CIVILITY: MANNERS IN NINETEENTH-CENTURY URBAN AMERICA 219 (1990).

The black Africans who were transported to America from the 1620s onward hailed from cultures that had only limited experience with writing. Mostly living as slaves on the other side of the Middle Passage, blacks were given neither the literate instruction nor the exposure to the written word that many American whites took for granted. Southern "slave codes" of the eighteenth and nineteenth centuries in fact prohibited anyone from teaching blacks to read and write, for fear that they might become vulnerable to abolitionist tracts or use their skills to communicate with each other and foment rebellion.[269] These prohibitions were lifted after the Civil War, but African Americans in the South and the North alike continued to face discrimination and prejudice which formally and informally prevented them from gaining equal access either to the schools where basic literacy was taught, or to the universities where students mastered entire fields of written learning.[270] The impossibility in these circumstances of black Americans (as a group) becoming highly dependent upon, and therefore partial toward, the written word has largely precluded vision and visual forms from achieving the same prominence in the African American community as they have attained in white America.[271] Notwithstanding black achievements in the literary and visual arts, contemporary African American cultural critic Michele Wallace actually claims that there exists a "visual void in black discourse"[272] attributable to "intra-racial pain and outside intervention."[273] Exclusively visual expression and experience—including reading and writing—have even been denigrated by some members of the African American community as being either secondary repositories of the African American heritage[274] or, more provocatively, undesirable marks of racial assimilation and oppression.[275]

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[267] "The ritualistically silent audience of the nineteenth century was an audience of 'readers' observing a print convention." RICHARD LANHAM, THE ELECTRONIC WORD: DEMOCRACY, TECHNOLOGY AND THE ARTS 76 (1993); *see also* KASSON, *supra* note 266, at 239-40; LAWRENCE W. LEVINE, HIGHBROW/LOWBROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA 177-200 (1988).

[268] For a brief introduction to the late-nineteenth-century "silent reading" movement, see DANIEL CALHOUN, THE INTELLIGENCE OF A PEOPLE 82-85 (1973).

[269] The antiliteracy laws were not completely effective, however. In some cases, white slaveowners taught their slaves to read so that the latter could assist in keeping their masters' accounts or running their businesses. White children are also known to have instructed their black playmates and servants. THOMAS L. WEBBER, DEEP LIKE THE RIVERS: EDUCATION IN THE SLAVE QUARTER COMMUNITY 131-38 (1978). For a recent study of the extent and nature of African American literacy in the pre-Civil War South, see JANET D. CORNELIUS, "WHEN I CAN READ MY TITLE CLEAR": LITERACY, SLAVERY AND RELIGION IN THE ANTE-BELLUM SOUTH (1991).

[270] For a classic study of the various obstacles postbellum African Americans faced on the road to literate education, see HORACE M. BOND, EDUCATION OF THE NEGRO IN THE AMERICAN SOCIAL ORDER (1966). *See also* MEYER WEINBERG, A CHANCE TO LEARN: THE HISTORY OF RACE AND EDUCATION IN THE UNITED STATES (1973).

[271] Writing's limited role in African American society—especially in the antebellum period—was long complemented and its negative impact on African American visuality was even reinforced by the limited presence of paintings and other pictures in African American homes. As Frederick Douglass noted in 1870:

> Heretofore, colored Americans have thought little of adorning their parlors with pictures . . . . Pictures come not with slavery and oppression and destitution, but with liberty, fair play and refinement. These conditions are now possible to colored American citizens, and I think the walls of their houses will soon begin to bear evidence of their altered relation to the people about them.

Quoted in KATHERINE M. MCCLINTON, THE CHROMOLITHOGRAPHS OF LOUIS PRANG 37 (1973).

[272] Michele Wallace, *Afterword: "Why Are There No Great Black Artists?": The Problem of Visuality in African American Culture*, *in* BLACK POPULAR CULTURE 333, 334 (Gina Dent ed., 1992).

[273] Michele Wallace, *Modernism, Postmodernism and the Problem of the Visual in Afro-American Culture*, *in* OUT THERE: MARGINALIZATION AND CONTEMPORARY CULTURE 39, 40 (Russell Ferguson et al. eds., 1990); *see also* West, *supra* note 259, at 71 ("I do not believe we have produced an African-American painter comparable to a John Coltrane or a Duke Ellington. In fact I don't even think we've produced a writer comparable to them. But you have this long history in which literacy was denied, in which pictorial art was downplayed . . . .").

[274] The African cultures from which black Americans came have historically declined to accord superior status to the visual. Thus, "African aesthetics beautifully blends the human senses of sight, touch, sound, and the physical feel of movement . . . [while] Western literacy has led to a rearrangement of the senses, with emphasis on the visual, on looking." SIMON OTTENBERG, ANTHROPOLOGY AND AFRICAN AESTHETICS 9 (1971); *see also* Ian Ritchie, *Fusion of the Faculties: A Study of the Language of the Senses in Hausaland*, *in* VARIETIES, *supra* note 48, at 192.

[275] GENEVA SMITHERMAN, TALKIN AND TESTAFYIN: THE LANGUAGE OF BLACK AMERICA 76-77 (1977); *see also* Ashraf H.A. Rushdy, *Reading Mammy: The Subject of Relation in Sherley Anne Williams'* Dessa Rose, 27 AFRICAN AM. REV. 365, 366 (1993) ("[T]he written word represents the processes used by racist white American institutions to proscribe and prescribe African American subjectivity."). On the correlation between being seen to excel at or to enjoy a variety of textual and observational skills and "acting white," see Signithia Fordham & John Ogbu, *Black Students' School Success: Coping with the Burden of "Acting White,"* 18 URB. REV. 176, 181 (1986).

While obviously excelling at a visual craft, a number of African American novelists have expressed or demonstrated discomfort with visuality, especially as they have associated that with white American culture. The most obvious case in point is Ralph Ellison, author of the *Invisible Man* (1952). Toni Morrison's first novel, *The Bluest Eye* (1970), featured a young female character, Pecola Breedlove, suffering under the racist, judgmental gaze of her white teachers and the other white people in her community. Morrison's narrator, Claudia MacNeer, "vents her rage against this eye-dominated culture by poking out the 'glassy blue eyeballs' of a baby doll." Anthony J. Berret, *Toni Morrison's Literary Jazz*, 32 CLA J. 267, 269 (1989); *see also* Malin L. Walther, *Out of Sight: Toni Morrison's Revision of Beauty*, 24 BLACK AM. LITERATURE F. 775, 786 (1990) (discussing how Morrison's writing consistently "removes black beauty from the [white] specular system").

Both by force and by choice, African American culture has retained an appreciation and respect for its own oral tradition that white American culture has largely lost. That tradition began with the bits and pieces of ancient African lore—songs and stories, proverbs and parables—that individual Africans held in their heads when they were taken as slaves from their homelands.[276] Later generations of black Americans developed and elaborated upon it according to their own unique needs and conditions.[277] Today it lives most vibrantly in storytelling,[278] preaching,[279] "toasts,"[280] "signifying,"[281] jazz,[282] and rap.[283] It is a defining, even privileged, element in African American culture:[284] as Cornel West has recently noted, the "*organic* intellectual traditions in African-American life . . . are oral, improvisational, and histrionic . . . ."[285] White Americans have tended to interpret this aurality as a mark of ongoing African American disempowerment, but for many African Americans it is equally a mark of survival and resistance.[286] Such an historical and political commitment to speech and sound has understandably induced in the African American community a certain suspicion of silence, which by definition would suppress oral interaction and hence compromise cultural continuity.[287]

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[276] On the oral traditions of various African cultures, see generally JOHN M. CHERNOFF, AFRICAN RHYTHM AND AFRICAN SENSIBILITY (1979); OKPEWHO, *supra* note 70. On the general significance of sound in African societies, see PAUL STOLLER, THE TASTE OF ETHNOGRAPHIC THINGS: THE SENSES IN ANTHROPOLOGY 101-22 (1989) (discussing sound in African Songhay culture); Philip M. Peek, *The Sounds of Silence: Cross-World Communication and the Auditory Arts in African Societies*, 21 AM. ETHNOLOGIST 474 (1994).

[277] *See generally* BEN SIDRAN, BLACK TALK (1971); SMITHERMAN, *supra* note 275. On the important cultural and communicative role of the aural arts in African American plantation society in particular, see ROGER D. ABRAHAMS, SINGING THE MASTER: THE EMERGENCE OF AFRICAN AMERICAN CULTURE IN THE PLANTATION SOUTH (1992); LAWRENCE W. LEVINE, BLACK CULTURE AND BLACK CONSCIOUSNESS: AFRO-AMERICAN FOLK THOUGHT FROM SLAVERY TO FREEDOM (1977).

[278] *See generally* TALK THAT TALK: AN ANTHOLOGY OF AFRICAN AMERICAN STORYTELLING (Linda Gross & Marian E. Barnes eds., 1989).

[279] *See generally* GERALD L. DAVIS, I GOT THE WORD IN ME AND I CAN SING IT, YOU KNOW: A STUDY OF THE PERFORMED AFRICAN-AMERICAN SERMON (1985).

[280] *See* SMITHERMAN, *supra* note 275, at 157-61.

[281] *See generally* Henry L. Gates, Jr., *The Signifying Monkey and the Language of Signifyin(g): Rhetorical Differences and the Orders of Meaning*, *in* THE SIGNIFYING MONKEY: A THEORY OF AFRICAN-AMERICAN LITERARY CRITICISM 44 (1988); Patricia Sullivan, *Signification and African-American Rhetoric: A Case Study of Jesse Jackson's "Common Ground and Common Sense" Speech*, 41 COMM. Q. 1 (1993).

[282] *See generally* SIDRAN, *supra* note 277.

[283] On rap's roots in African American oral tradition, see Jimmie L. Briggs, Jr., *Where They're Calling From: Cultural Roots of Rap*, 2 WM. & MARY BILL RTS. J. 151, 155-56 (1993); Tricia Rose, *Orality and Technology: Rap Music and Afro-American Cultural Resistance*, POPULAR MUSIC & SOC'Y, Winter 1989, at 35.

[284] Phillip B. Harper, *Synesthesia, "Crossover," and Blacks in Popular Music*, 23 SOC. TEXT 102, 103 (1989) ("[T]he privileging of aural . . . expression over the visual is a vital element in the larger Afro-American cultural tradition.").

[285] Cornel West, *The Dilemma of the Black Intellectual*, J. BLACKS HIGHER EDUC., Winter 1993-94, at 59, 61.

Oral traditions and forms have notably resonated in the corpus of African American literature which has come into existence since the American Revolution.[288] In the mid-nineteenth century, Frederick Douglass's writings rang with the rhythmic cadences of speech.[289] In 1903, W.E.B. Du Bois set *The Souls of Black Folk* in an additive, metered, and somewhat repetitive prose style that almost literally echoed the most effective forms of oral presentation;[290] he introduced his chapters with musical epigraphs (bars from African American "sorrow songs") that overtly testified to the cultural power of aurality.[291] In the 1930s and 1940s, Langston Hughes's poetry consciously captured the syncopated nuances of jazz and "be-bop."[292] More recently, Maya Angelou has declared of her own work:

> I write for the Black voice and any ear which can hear it. As a composer writes for musical instruments and a choreographer creates for the body, I search for sound, tempos, and rhythms to ride through the vocal cord over the tongue, and out of the lips

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[286] *See* Harryette Mullen, *Runaway Tongue: Resistant Orality in* Uncle Tom's Cabin, Our Nig, Incidents in Life as a Slave Girl, *and* Beloved, *in* THE CULTURE OF SENTIMENT: RACE, GENDER AND SENTIMENTALITY IN NINETEENTH CENTURY AMERICA 244 (Shirley Samuels ed., 1992); Rose, *supra* note 283, at 37 ("Rap constitutes a form of resistance and self-identification for young working-class black[s] . . . who are completely marginalized.").

[287] THOMAS KOCHMAN, BLACK AND WHITE STYLES IN CONFLICT 22-23 (1981).

[288] *See* JOHN F. CALLAHAN, IN THE AFRICAN-AMERICAN GRAIN: THE PURSUIT OF VOICE IN TWENTIETH CENTURY BLACK FICTION (1988); GAYL JONES, LIBERATING VOICES: ORAL TRADITION IN AFRICAN AMERICAN LITERATURE (1991); Lawrence B. James, *The Influence of Black Orality on Contemporary Black Poetry and Its Implications for Performance*, 45 S. SPEECH COMM. J. 249 (1980); Mullen, *supra* note 286; Mary L.E. Martin, Orality and Black Nonfiction Prose Style in the Nineteenth and Twentieth Centuries (1990) (unpublished Ph.D. dissertation, George Washington University) (on file with author).

[289] For an extended discussion of Douglass's "oral style," see Martin, *supra* note 288, at 88-128.

[290] For an extended discussion of Du Bois's "oral style," see *id.* at 168-82.

[291] On the significance of these songs in Du Bois's writing and thought, see ERIC J. SUNDQUIST, TO WAKE THE NATIONS: RACE IN THE MAKING OF AMERICAN LITERATURE 457-539 (1993).

[292] *See generally* L.L. Dickson, *"Keep It in the Head": Jazz Elements in Modern Black American Poetry*, 10 MELUS 29 (1983).

> of Black people. . . . I accept the glory of stridencies and purrings, trumpetings and somber sonorities.[293]

Music and oral storytelling have additionally provided the narrative frameworks or have been particularly prominent themes in the writings of a variety of African American novelists.[294]

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[293] Maya Angelou, *Shades and Slashes of Light*, *in* BLACK WOMEN WRITERS 1950-1980, at 3, 3-4 (Mari Evans ed., 1984). Compare the comments of African American novelist Gayl Jones:

> I still feel that the best of my writing comes from having heard rather than read. . . . Hearing has to be essential . . . . You have to be able to hear other people's voices and you have to be able to hear your own voice. . . . I have to bring the written things into the oral mode before I can deal with them.

Melvin Dixon, *Singing a Deep Song: Language as Evidence in the Novels of Gayl Jones*, *in* BLACK WOMEN WRITERS 1950-1980, *supra*, at 236, 238-39.

In light of my earlier comments suggesting that American men in general may have a relatively visual bias and American women in general may have a relatively aural bias, it is very interesting to note one critic's suggestion that for all they may have in common as the products of an African American culture which respects the aural more than does its white American counterpart, "[t]he texts of black women are different from literature by black men. . . . [T]he area of their distinctiveness lies between the spoken text and the expressive text—between voice and vision. . . . [T]exts by black males often isolate the word, circumscribe its territory and subordinate its voice to expressive behaviors." KARLA F.C. HOLLOWAY, MOORINGS AND METAPHORS: FIGURES OF CULTURE AND GENDER IN BLACK WOMEN'S LITERATURE 6-7 (1992). Another commentator has suggested that African American male writers such as Langston Hughes, Richard Wright, and Ralph Ellison have been more concerned with texts and the acts of reading and writing, while African American female writers such as Zora Neale Hurston and Toni Morrison have been more concerned with voice and orality. Deborah Clarke, *"What There Was Before Language": Preliteracy in Toni Morrison's Song of Solomon*, *in* ANXIOUS POWER: READING, WRITING AND AMBIVALENCE IN NARRATIVE BY WOMEN 265, 266-67 (Carol J. Singley & Susan E. Sweeney eds., 1993); *see also* Pearlie M. Peters, *"Ah Got the Law in My Mouth": Black Women and Assertive Voice in Hurston's Fiction and Folklore*, 37 CLA J. 293 (1994).

[294] On the role of music as theme and touchstone in African American literature, see Berret, *supra* note 275; Eleanor W. Traylor, *Music as Theme: The Blues Mode in the Works of Margaret Walker*, *in* BLACK WOMEN WRITERS 1950-1980, *supra* note 293, at 511; Eleanor W. Traylor, *Music as Theme: The Jazz Mode in the Works of Toni Cade Bambara*, *in* BLACK WOMEN WRITERS 1950-1980, *supra* note 293, at 58; Alfonso W. Hawkins, Jr., The Musical Tradition as an Affirmation of Cultural Identity in African American Autobiography (1993) (unpublished Ph.D. dissertation, Ohio State University) (on file with author).

On the role of oral storytelling in contemporary African American fiction, see generally Jay Clayton, *The Narrative Turn in Recent Minority Fiction*, 2 AM. LITERARY HIST. 375 (1990). The climax of David Bradley's *The Chaneysville Incident* (1981) notably features the night-long retelling of a historical tale about escaped slaves. Alex Haley's *Roots* (1976) is the story of a personal quest made possible by a history of family storytelling, a quest which culminates in Haley hearing a West African griot recount how one of Haley's own ancestors was abducted by slavers. Toni Morrison's *Song of Solomon* (1977) features three characters—Macon Dead, First Corinthians, and Milkman—who through personal experiences rediscover the power of stories told and heard. (On the specific connection between Morrison's storytelling and African American oral tradition, see Clarke, *supra* note 293; Joyce I. Middleton, *Orality, Literacy, and Memory in Toni Morrison's* Song of Solomon, 55 C. ENG. 64 (1993)). John Wideman's *Reuben* (1987) is about an unlicensed lawyer who helps clients by simply listening to them tell their own stories. Compare the prominence of

On the levels of language and ethnicity as distinguished from "race," Americans from the loosely defined "Anglo" community may also be said to have had, as a group, a relatively closer association with the written word than have Americans from "Hispanic" backgrounds. Members of the former group have had considerable facility with the English language. In some instances, their ancestral or psychological attachment to an English culture which traditionally has placed greater emphasis on reading and writing than have some other European societies[295] has given them a unique advantage in an English-based, writing-oriented American educational structure. Both in and out of school, many Anglo-Americans additionally have had physical and economic recourse to a good deal of written English language material. Finally, Anglos have traditionally controlled the major American print media and have been in a unique position to set the aesthetic standards for the American visual arts. All these factors have encouraged Anglo-Americans, as a group, to take a greater interest in, and become more dependent upon, visual expression and experience.

Americans from Hispanic backgrounds have traditionally been burdened by discriminatory Anglo attitudes and policies that have directly and indirectly kept them at the margins of American written culture.[296] Hispanic Americans have faced enormous linguistic barriers: in a culture which has informally (and in some American jurisdictions, formally) adopted English as its official language, English language literacy has been made a prerequisite for access to "mainstream" American culture. The difficulty of learning to read English in English language classrooms at a stage of life when Spanish speaking children have not yet mastered Spanish has been a leading cause of the high dropout rates traditionally encountered among Hispanic American school students.[297] At the same time, the successful cultivation of Spanish language literacy has been rendered problematic because of the intolerance or lack of facilities for Spanish language instruction in most American schools and universities.[298] With much written material in both English and Spanish having thus been rendered largely meaning-

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storytelling in these and other works with the prominence of storytelling in the *Canterbury Tales* and the *Decameron*. *See supra* p. 253.

[295] *See generally* GRAFF, *supra* note 117.

[296] John H. Burma, *Introduction* to MEXICAN-AMERICANS IN THE UNITED STATES: A READER at xvii (John H. Burma ed., 1970) [hereinafter MEXICAN-AMERICAN READER].

[297] *See generally* A.R. Ramirez, *Adult Illiteracy*, *in* MEXICAN-AMERICAN READER, *supra* note 296, at 100; NEA—Tuscon Survey, *The Invisible Minority*, *in* MEXICAN-AMERICAN READER, *supra* note 296, at 103, 107-08.

[298] NEA—Tuscon Survey, *supra* note 297, at 110-11.

less or inaccessible, American Hispanic culture has not been pulled towards visuality in the same manner as has its Anglo counterpart.[299] Instead, many Hispanics have repeatedly found themselves drawn and sometimes forced back into the soundscapes of their own ethnic communities. Here, aurality born of discrimination and necessity has been positively reinforced by strong Spanish and Native American oral traditions,[300] with the result that aural expression has been the primary conduit of Hispanic language and culture.[301] Today the power and attraction of aurality in Hispanic American life is manifested in the strength of contemporary Hispanic storytelling, in the ongoing popularity of dialogic "competitive" and "collective" recollections offered by Hispanic elders,[302] and in the cultural prominence of traditional Hispanic ballads (*corridos*).[303] Somewhat less directly, the same aurality is reflected in Hispanic American novels that draw on *cuentos* (traditional oral tales),[304] in Hispanic American poetry inspired by *corridos*[305] or written with the specific intention of being read aloud,[306] and in the variety of oral histories that have begun to document different aspects of the Hispanic American experience.[307]

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[299] "Were the Hispanic community in the United States to possess the means of production, promotion, and distribution of its literature in printed form, were it to control its history and image in print, [Hispanic writers'] works might be more print-bound [i.e., more visually oriented] . . . ." Nicolas Kanellos, *Orality and Hispanic Literature in the United States*, *in* REDEFINING AMERICAN LITERARY HISTORY, *supra* note 213, at 117, 122.

[300] Arnulfo D. Trejo, *Of Books and Libraries*, *in* THE CHICANOS: AS WE SEE OURSELVES 167, 172-74 (Arnulfo D. Trejo ed., 1979). It is noteworthy that the rate of illiteracy among Spanish adults as late as the 1850s was roughly 75%, as compared to 30% to 33% among English adults. CARLO M. CIPOLLA, LITERACY AND DEVELOPMENT IN THE WEST 115 (1969).

[301] "For the Mexican American, the spoken language has been the primary means of transmitting from one generation to another information that is considered significant and/or unusual." Trejo, *supra* note 300, at 172.

[302] *See generally* CHARLES L. BRIGGS, COMPETENCE IN PERFORMANCE: THE CREATIVITY OF TRADITION IN MEXICANO VERBAL ART 59-99 (1988).

[303] *See generally* Reynaldo Ruiz, *The* Corrido *as a Medium for Cultural Identification*, *in* IMAGINATION, EMBLEMS AND EXPRESSIONS: ESSAYS ON LATIN AMERICAN, CARIBBEAN, AND CONTINENTAL CULTURE AND IDENTITY 53 (Helen Ryan-Ranson ed., 1993). *See also* Trejo, *supra* note 300, at 172.

[304] See, for example, the works of Rudolfo Anaya, discussed in Reed W. Dasenbrock, *Forms of Biculturalism in Southwestern Literature: The Work of Rudolfo Anaya and Leslie Marmon Silko*, 21 GENRE 307 (1988).

[305] *See generally* José E. Limon, *Oral Tradition and Poetic Influence: Two Poets from Greater Mexico*, *in* REDEFINING AMERICAN LITERARY HISTORY, *supra* note 213, at 124.

[306] *See generally* Kanellos, *supra* note 299.

[307] *See, e.g.,* MARILYN P. DAVIS, MEXICAN VOICES/AMERICAN DREAMS: AN ORAL HISTORY OF MEXICAN IMMIGRATION TO THE UNITED STATES (1990); MARTIN, *supra* note 234; BEATRICE R. OWSLEY, THE HISPANIC-AMERICAN ENTREPRENEUR: AN ORAL HISTORY OF THE AMERICAN DREAM (1992).

With respect to religion, the American Protestant community's special affection for the written word is born of the traditional Protestant conviction that only the written Bible contains the pure and true word of God (*sola scriptura*). In this context, reading has been considered as more than just a skill; it has been regarded as a sure route to salvation. The initial Protestant (largely Lutheran) enthusiasm for the spoken word during the sixteenth and seventeenth centuries[308] may be construed as a temporary response to the realities of then limited European literacy; in the short term, what was written might at least be heard by all if it could not yet be read by all.[309] As their religious beliefs encouraged Protestants to become more literate, however, the textualist theologies of John Calvin and Huldrych Zwingli gained ground[310] and Protestantism as a whole became more visualist. The American Puritans notably thought of God less as a speaker than as a spectator. The pulpits of many New England meetinghouses bore but a single graphic device: "an enormous, carefully painted, staring eye, a terrible and suggestive illustration to youthful wrong-doers of the great all-seeing eye of God."[311] Men could help God by watching each other. In the Puritan meetinghouse, the elders sat underneath the pulpit so that they could see the congregation;[312] outside the meetinghouse, "holy-watching" over one's neighbors was part of a man's civic and religious duty.[313] American Quakers sought a metaphorically visual "Inner Light" and adopted as their primary form of collective worship the so-called "silent meeting" in which they "waited upon the Spirit" with only occasional spoken interjections.[314] American Shakerism also had a strong visionary component: according to Shaker theology, "righteousness involved *seeing* rightly."[315] Contemporary American Protestantism certainly has neither abandoned nor rejected aurality out of hand (witness the speech practices associated with American Fundamentalism),[316] but it is noteworthy that even the most voluble Protestant preachers not only insist upon citing chapter and verse from a Biblical text, but frequently carry that text about with them as a visible totem of their authority.

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[308] *See* WILLIAM A. GRAHAM, *Hearing and Seeing: The Rhetoric of Martin Luther*, *in* BEYOND THE WRITTEN WORD: ORAL ASPECTS OF SCRIPTURE IN THE HISTORY OF RELIGION 141 (1987); *see also* Woolf, *supra* note 132, at 174-75.

[309] *See generally* Robert Scribner, *Oral Culture and the Diffusion of Reformation Ideas*, 5 HIST. EUR. IDEAS 237 (1984).

[310] *See generally* James A. Freeman, Orality Versus Textuality in the Reformation: The Origin and Influence of Textuality on Theological Perspectives in the Sixteenth Century (1990) (unpublished Ph.D. dissertation, Rice University) (on file with author). For a specific discussion of Zwingli's scripturally inspired attack on music in worship, see CHARLES GARSIDE, JR., ZWINGLI AND THE ARTS 43-47 (1966).

[311] ALICE M. EARLE, THE SABBATH IN PURITAN NEW ENGLAND 16 (photo. reprint 1974) (1891).

[312] DAVID H. FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA 118 (1989).

[313] ROGER THOMPSON, SEX IN MIDDLESEX: POPULAR MORES IN A MASSACHUSETTS COUNTY, 1649-1699, at 32, 169-89 (1986).

[314] *See generally* Richard Bauman, *Speaking in the Light: The Role of the Quaker Minister*, *in* EXPLORATIONS IN THE ETHNOGRAPHY OF SPEAKING 144 (Richard Bauman & Joel Sherzer eds., 2d ed. 1989).

The practices and doctrines of both the Catholic and Jewish faiths have arguably disinclined their American adherents (as groups) from embracing the written word as unreservedly as have American Protestants. Catholicism has always had considerable respect for a clerical interpretation of Scripture dependant upon the aural and sometimes actually catechistic relationship between priest and parishioner. The Catholic Church still subscribes to a resolution of the 1546 Council of Trent that declared oral dogma to be equivalent in stature to the Scriptures themselves: it had been "received by the apostles from the lips of Christ himself, or by the same apostles at the dictation of the Holy Spirit."[317] The Catholic emphasis on oral revelation has not dissuaded many American Catholics from developing a high degree of reliance on the written word, but it has made such a reliance less necessary to their spiritual well-being. As a result, American (and for that matter, North American) Catholic culture has been relatively less committed to a strictly visualist interpretation of existence, to the extent that two of the foremost investigators and exponents of aurality since the 1960s have been a Catholic convert (Marshall McLuhan)[318] and a Jesuit priest (Walter Ong).

The various strands of American Jewish culture have likewise shared a broader sensory base. Jews have frequently been called "People of the Book," but this reference to the importance of written scripture in Judaism should not be permitted to mask a significant aurality rooted in the Jewish experience of God.[319] In marked contrast to the visibility of Christ in the New Testament,[320] Yahweh in the Hebrew Bible preferred not to show Himself or permit Himself to be shown (thus the Second Commandment: "You shall not make yourself a graven image . . . .").[321] Instead, Yahweh spoke to Israel either directly or through his prophets (hence the classic formula "Hear, O Israel").[322] The relationship between God and his people became implicitly and sometimes explicitly dialogic.[323] Several commentators have suggested that this pattern of aural interaction had profound epistemological consequences within the Jewish community. The Jewish theologian and philosopher Martin Buber, noting early in this century that "the most vivid descriptions in ancient Jewish writing are acoustic in nature," ventured that "[t]he Jew of antiquity was more of an aural than a visual man."[324] More recently, rabbinic scholar José Faur has posited that "[f]or the Hebrews, the highest form of truth is perceived at the auditory level. . . . The highest expression of reality is found in communicative speech. The outer aspect of things is unimportant. Neither Scripture nor the rabbis gave visual descriptions of things or people."[325]

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[315] SALLY M. PROMEY, SPIRITUAL SPECTACLES: VISION AND IMAGE IN MID-NINETEENTH CENTURY SHAKERISM 19 (1993). The "first Shaker," Ann Lee, is supposed to have said, "I look into the windows of heaven, and see what there is in the invisible world." *Quoted in id.* at 17.

[316] *See, e.g.*, Daniel N. Maltz, *Joyful Noise and Reverent Silence: The Significance of Noise in Pentecostal Worship*, *in* PERSPECTIVES ON SILENCE 113 (Deborah Tannen & Muriel Saville-Troike eds., 1985).

[317] 3 CAMBRIDGE HISTORY OF THE BIBLE 193 (S.L. Greenslade ed., 1963). For an extended discussion of orality's influence on early Christian life, thought, and writing, see Paul J. Actemeier, Omne Verbum Sonat: *The New Testament and the Oral Environment of Late Western Antiquity*, 109 J. BIBLICAL LITERATURE 3 (1990).

[318] At least one student of McLuhan's thought has explicitly concluded that his "communication theory was a direct outgrowth of his Catholicism." ARTHUR KROCKER, TECHNOLOGY AND THE CANADIAN MIND: INNIS/MCLUHAN/GRANT 78 (1984).

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[319] One commentator has suggested that the label "is a strange one for a people who . . . made prodigious efforts to prevent just the fate of being smothered by texts." DANIEL J. SILVER, STORY OF SCRIPTURE: FROM ORAL TRADITION TO THE WRITTEN WORD 276 (1990).

[320] "And the Word became flesh and dwelt among us . . . ; we have beheld his glory." *John* 1:14.

[321] *Exodus* 20:4.

[322] *E.g. Deuteronomy* 6:4. *See* SUSAN A. HANDELMAN, THE SLAYERS OF MOSES: THE EMERGENCE OF RABBINIC INTERPRETATION IN MODERN LITERARY THEORY 17 (1982); Raymond A. Bowman, *Yahweh as Speaker*, 3 J. NEAR E. STUD. 1 (1944); Don Ihde, *Studies in the Phenomenology of Sound: III. God and Sound*, 10 INT'L PHIL. Q. 247 (1979); Adin Steinsaltz, *The Command Is to Hear: An Interview with Rabbi Adin Steinsaltz*, 19 PARABOLA 27 (1994). The notion of God as speaker is magnificently captured in the rabbinic legend that holds that if all things in the world were to fall silent, humankind would hear the voice of God from Sinai, incessantly pronouncing the words of the Ten Commandments. DAVID J. WOLPE, IN SPEECH AND IN SILENCE: THE JEWISH QUEST FOR GOD 45 (1992). *But see also* Daniel Boyarin, *The Eye in the Torah: Ocular Desire in Midrashic Hermeneutic*, 16 CRITICAL INQUIRY 532 (1990) (arguing that the importance of visual revelation in Judaism has traditionally been underestimated).

[323] It has been said that the Hebrew Bible is "full of a dialogue between heaven and earth. It tells us how again and again God addresses man and is addressed by him. . . . [S]ometimes these records actually assume a dialogic form." MARTIN BUBER, ON JUDAISM 214 (1967). *See generally* WALTER L. REED, DIALOGUES OF THE WORD: THE BIBLE AS LITERATURE ACCORDING TO BAKHTIN (1993).

[324] *Quoted in* Herbert Howarth, *Jewish Art and the Fear of the Image: The Escape from an Age-Old Inhibition*, COMMENTARY, Feb. 1950, at 142, 143. *See also* Shemaryahu Talmon, *Oral Tradition and Written Transmission, or the Heard and the Seen Word in Judaism of the Second Temple Period*, *in* JESUS AND THE ORAL GOSPEL TRADITION 121, 156 (Henry Wansbrough ed., 1991) ("In the biblical milieu, aurality, viz. the heard word, fulfils the function which visibility, viz. written transmission and/or pictorial narration, fulfils in cultures that are more manuscript-conscious.").

Aurality still animates many aspects of Jewish life and belief. Reflecting a long tradition of oral recitation, the books of the Hebrew Bible are known to Jews by a form of *incipit*, in this instance the first significant word in the book's text.[326] Part of the Torah remains expressly "Oral" (*Torah shebe'al-peh*, literally "the Torah that is memorized").[327] Although actually written down since the third century C.E., it must not be publicly taught from a docu-

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[325] JOSÉ FAUR, GOLDEN DOVES WITH SILVER DOTS: SEMIOTICS AND TEXTUALITY IN RABBINIC TRADITION 29-30 (1986). Compare the comment of Jewish historian Hans Kohn:

> [T]o this folk [i.e., the Jews] did God become a voice. Again and again sounds the command "Hear!" When Elijah becomes aware of God he hears only a still small voice. Therefore the Jew never made himself an image of God. It is the word, the *logos*, which to the Jews is the mediator between the infinite and the individual, and the word carries more of infinity within it than the sharp form of the frozen image.

Quoted in Howarth, *supra* note 324, at 144; *see also* BOMAN, *supra* note 85; HANDELMAN, *supra* note 322 (discussing aurality's impact on various dimensions of Jewish religious tradition); Philip S. Alexander, *Orality in Pharisaic-Rabbinic Judaism at the Turn of the Eras*, *in* JESUS AND THE ORAL GOSPEL TRADITION, *supra* note 324, at 159.

In light of such comments, it is interesting to note that ancient Judaism took a limited turn towards the visual when it encountered Hellenistic Greek culture (on the visuality of which *see supra* notes 107-16 and accompanying text). In the first century A.D., for instance, the Jewish commentator, Philo of Alexandria, repeatedly "transform[ed] . . . biblical expressions involving hearing into ones involving sight." HANS BLUMENBERG, THE LEGITIMACY OF THE MODERN AGE 286 (Robert M. Wallace trans., MIT Press 1983).

[326] Thus, Genesis begins with the words "In the beginning," and in Hebrew is called *Bereshit*; Exodus begins with the word "Names," and is called *Sh'mot*; Leviticus begins with the words "In the wilderness," and is called *Bamidbar*; and Deuteronomy begins with the word "Propositions," and is called *D'varim*. Arthur J. Jacobson, *The Idolatry of Rules: Writing Law According to Moses, with Reference to Other Jurisprudences*, 11 CARDOZO L. REV. 1079, 1079 n.1 (1990). Compare the medieval method of labelling statutes, *supra* note 140 and accompanying text.

[327] On Oral Torah, see generally BIRGER GERHARDSSON, MEMORY AND MANUSCRIPT: ORAL TRADITION AND WRITTEN TRANSMISSION IN RABBINIC JUDAISM AND EARLY CHRISTIANITY (1961); JACOB NEUSNER, ORAL TRADITION IN JUDAISM: THE CASE OF THE MISHNAH (1987). The Judaic insistence on Oral Torah as a necessary complement to Written Torah has led at least one commentator to suggest, not altogether tongue in cheek, that "[w]hat the *Catholic Encyclopaedia* writes [about oral revelation] could just as well have been written by a rabbi." Marcel Simon, *The Ancient Church and Rabbinic Tradition*, *in* HOLY BOOK AND HOLY TRADITION 94, 94 (F.F. Bruce & E.G. Rupp eds., 1968). The religious and cultural importance of Oral Torah is emphasized by this excerpt from the *Midrash*:

> After he had taught Moses the oral Torah, the Holy One - blessed be He - said unto him: teach it to Israel. Moses answered: Lord of the Universe, I shall write it down for them. But God replied, saying: I do not want you to write it down, for I know that the nations of the world will rule over Israel and attempt to take it from them. I give Israel *mikra* [reading] in written form, but I give them

ment.[328] The Talmud pointedly preserves the sayings of the rabbis (thus the standard Talmudic formula, "Rabbi X said . . ."). Since the early sixteenth century the Talmud has been printed in a way which literally surrounds the principal text with later commentaries, thereby perpetuating an implicitly dialogic relationship between the text and the commentary on the same page, or better yet, between the original "speaker" and the commentators.[329] When studying aloud that portion of the Talmud called the *Gemara* "students expressing the argument on the page [of the text] tend to speak for and with the sages in their confrontations, as if the sages were talking to each other today."[330] Even the "silent meditation" of the *Amidah*, the Jewish prayer service, is a faintly audible process: to quote the Talmud, "words in the heart are not words."[331] Finally, no consideration of the aural aspects of contemporary Judaism would be complete without mention of Yiddish, the usually spoken but (at least until recently) rarely written folk language that has long served as "the vehicle of . . . social and political cohesion" in the Jewish community.[332]

Taking advantage of the social power that their relatively greater access, exposure, and commitment to writing has helped to give them, American men, whites, Anglos, and Protestants have filled the ranks of the American legal profession from its very beginnings. Inevitably, they have brought their own sensory preferences into American legal life. It is they who have been principally responsible for designing courts and legal rules that have directly

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> Mishna, Talmud and Agada orally, and thus will Israel be distinguished from all other nations.

MIDRASH RABBA, *Exodus* 47, *quoted* in Simon, *supra*, at 110.

[328] FAUR, *supra* note 325, at 100-02.

[329] Joseph Lukinsky, *Law in Education: A Reminiscence with Some Footnotes to Robert Cover's* Nomos and Narrative, 96 YALE L.J. 1836, 1840, 1841 (1987); *see also* WOLPE, *supra* note 322, at 116-17.

[330] Lukinsky, *supra* note 329, at 1840; *see also* Jonathan Boyarin, *Voices Around the Text: The Ethnography of Reading at Mesivta Tifereth Jerusalem*, *in* THE ETHNOGRAPHY OF READING, *supra* note 248, at 212 (discussing the relationship of text and speech in Jewish study).

[331] *Quoted in* WOLPE, *supra* note 322, at 123. The importance of spoken prayer in Jewish tradition is intimately connected with God's status not only as a speaker, but as a listener. *Id.* at 125-27.

[332] BENJAMIN YARSHAV, THE MEANING OF YIDDISH 79 (1990). As this Article was going to print, I chanced upon a recent comment by Rabbi Harold S. Kushner that generally reinforces the points made in this paragraph about the place of aurality in modern Judaism: "*We sanctify our power of speech*. . . . While some would claim that 'talk is cheap,' in Judaism words are real . . . . Jews take words seriously . . . because, since the Temple was destroyed nineteen hundred years ago and we no longer bring animal offerings, words are the currency of our transactions with God." HAROLD S. KUSHNER, TO LIFE!: A CELEBRATION OF JEWISH BEING AND THINKING 69 (1993).

and indirectly favored visual experience.[333] It is they who have established and perpetuated norms of legal interpretation and legal scholarship that, at least until recently, have largely marginalized and delegitimized aurality, aural styles, and aurally based written forms.[334] It is they who (as we shall see) have pushed legal philosophy towards values that have traditionally been associated with vision.

When they have spoken the actual language of the law, individuals from the more visualist American groups have analogously been drawn to metaphors and figures of speech appealing to their visualist predelictions. In the sundry expressions we encountered in the Introduction to this Article, they have presented law not so much as a speaking or as any other kind of aural enterprise, but as a looking, something to see and be seen. This language has inevitably empowered them by making the law more recognizable and accessible. At the same time, visualist legal metaphors have, perhaps not entirely by accident, disempowered and alienated members of American gender, racial, ethnic, and religious groups which have not been so visually oriented. Law expressed in visual terms has literally not resonated with their particular experiences.

The visuality of American law in general and American legal metaphors in particular has been made all the more compelling and oppressive because individuals from the dominant visualist groups have in the past used their power to exclude from both the legal profession and the legal professoriate members of other gender, racial, ethnic, or religious groups who, left to their own devices, might have preferred different legal procedures, legal standards, and ultimately, different legal language. It is well known that in the face of these efforts, the first American woman lawyer was not admitted to practice until 1869;[335] the first woman hired full-time by an American law faculty took up her position in 1927.[336] In 1950, only five of 1239 law faculty members were female.[337] The first African American to practice law professionally was not admitted to the bar until 1844,[338] and only in 1925 was a black law professor hired to teach at a "white" law school.[339] Protestants dominated the American bench[340] and bar as a whole through the early twentieth century, and in the face of unwelcome "intrusions" by immigrant-class Catholics and Jews, reserved for themselves the "high-ground" of corporate law until very recently.[341] Exact figures are hard to come by, but it would be accurate to say that the presence of Catholic and Jewish lawyers on American law faculties was similarly restricted well into this century. Hispanic Americans, the overwhelming majority of whom are Catholic, are only just beginning to break into mainstream legal practice[342] and still have only a toehold in the professoriate.[343] In this context, relatively few American lawyers or law professors have come from backgrounds that might have inclined them to push American legal metaphors in a nonvisualist sensory direction.

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[333] *See supra* notes 58-69 and accompanying text.

[334] *See supra* notes 70-73 and accompanying text.

[335] KAREN B. MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA: 1638 TO THE PRESENT 11 (1986) (referring to Belle Mansfield, admitted in Iowa).

[336] Herma H. Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 6 (1991) (referring to Harriet Spiller Daggett, Louisiana State University).

[337] Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799, 801 (1988).

[338] Kenneth S. Tollett, *Black Lawyers, Their Education, and the Black Community*, 17 HOW. L.J. 326, 329 (1972) (referring to Macon B. Allen, admitted in Maine).

Even those American lawyers who have come from less visualist backgrounds have for the most part adopted the visualist idiom. This outcome has been more or less assured by the hurdles to law school and bar admission that were raised from the late nineteenth century by a pedagogically ambitious, but also increasingly nervous male, white, Anglo, and Protestant dominated legal establishment. It will be recalled from the previous section of this Article that, until the late nineteenth century, American legal training had taken the form of either apprenticeship, which despite its textual orientation was still at least residually aural, or lecture and recitation-based classroom instruction for which there were few written or writing-related prerequisites. In the decades after 1870, however, individuals aspiring to the bar were compelled to complete high school (and later two years of college); they then had to attend textbook-based law schools where they learned how to dissect massive quantities of black letter law. They had to pass written examinations before graduating[344] or being admitted to the bar in most states.[345] Since the 1950s, would-be attorneys have also been subjected to the written Law School Admission Test ("LSAT").[346] Surviving such a process, which has obviously put a premium on the development of excellence in visual tasks while rendering aural traditions and talents irrelevant, can only have distanced successful female, African American, Hispanic, and even some Catholic and Jewish lawyers from their relatively more aural roots and any inclination they might have had to evoke those roots in aural legal metaphors.

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[339] J. CLAY SMITH, EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944, at 41 (1993) (referring to Clarence Mahoney, Buffalo Law School).

[340] On the historically marginal role of Catholic justices on the United States Supreme Court in particular, see Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1056-58 (1990).

[341] JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 50, 62 (1976). On discrimination against Jewish lawyers and law students, see Note, *The Jewish Law Student and New York Jobs: Discriminatory Effects in Law Firm Hiring Practices*, 73 YALE L.J. 625 (1964).

[342] Richard Brunelli, *Hispanic Lawyers Gaining Respect but Struggle Continues*, CHI. DAILY L. BULL., Nov. 7, 1986, at 1; James Evans, *Hispanic Attorneys Are 'Inching' Forward in the Profession*, L.A. DAILY J., Jan. 6, 1992, at 1.

[343] Rex Bossert, *The Hiring of Hispanic Faculty Is Up 25 Percent*, L.A. DAILY J., Jan. 10, 1992, at 1.

Even presuming that a modicum of cultural aurality might have survived the visually skewed professional initiation process, a variety of professional and social circumstances have traditionally conspired to dissuade many female, African American, Hispanic, Catholic, and Jewish jurists from drawing from their own experiences in ways that might have made aurality more prominent in their legal writing.[347] Because the number of these individuals within American law firms, law courts, and law faculties has, until recently, been small, these legal scholars have historically lacked the peer support and encouragement which is so important to the success of any serious intellectual, methodological, or terminological departure. The realities of tenure and promotion within American law schools still dominated by males, whites, Anglos, and Protestants, have moreover discouraged many nontraditional scholars from trying anything too novel, lest they be indirectly punished for doing so.[348] Finally, the perspectives represented by these legal scholars have traditionally lacked a critical measure of recognition and legitimacy in American culture at large, leading to preemptive concerns that any scholarship or thought based on these perspectives might well be rejected out of hand.[349] In this context, most female, African American, Hispanic, Catholic, and Jewish lawyers—despite their undoubted success in achieving greater social justice for members of their own and other "out groups"—have until recently been disinclined to challenge the fundamental visuality of American law and legal metaphor.

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[344] *See supra* note 209 and accompanying text.

[345] On the written bar examination as an ongoing obstacle for minority law students, see Dannye Holley & Thomas Kleven, *The Bar Examination and Other Barriers to African and Hispanic American Fair Representation Among American Lawyers: A 1990 Update-Perspectives—and Recommendations*, 16 T. MARSHALL L. REV. 477 (1991); Dannye Holley & Thomas Kleven, *Minorities and the Legal Profession: Current Platitudes, Current Barriers*, 12 T. MARSHALL L. REV. 299 (1987). On the bar examination as an obstacle for women, see Arthur E. Ryman, Jr., *Women and the Bar Exam: Thinking Like a Woman Lawyer*, 37 DRAKE L. REV. 79 (1987-1988) (noting that in 1987 the pass rate in Iowa for men was 77%, but for women only 66%).

[346] On the LSAT's negative impact on minority law school applicants, see Eulius Simien, *The Law School Admission Test as a Barrier to Almost Twenty Years of Affirmative Action*, 12 T. MARSHALL L. REV. 359 (1987).

[347] For example,

> for Jews and Catholics alike . . . it seems plausible to argue that there is a price attached to entry into leadership positions within [the bench and bar]. This price has been the modulation, if not outright suppression of much awareness of anything within their respective religious traditions that might be significantly different from—let alone pose a challenge to—the wider American (and Protestant?) culture.

Levinson, *supra* note 340, at 1058.

C. *Law and the Phenomenology of Sight*

In addition to being both a consequence of culture and a product of power, the historical popularity of visual metaphors in American legal discourse has been a function of the considerable overlap between the traditional American understanding of law and the predominant American understanding of vision. In this society, law and vision have been deemed to share certain characteristics and to favor similar values. American lawyers and legal scholars casting about for accessible, "sensible" ways in which to describe or explain difficult or theoretical legal concepts have therefore been particularly drawn to visual figures of speech.

Since at least the mid-nineteenth century, most American lawyers and jurists, if not all American law professors,[350] have understood law as being ideally abstract, disengaging, objective, determinate, timeless, systematic, and differentiatory.[351] Law has been regarded as abstract to the extent that its rules, principles, and such legal constructs as "the reasonable man" are generalizations independent of particular concrete circumstances.[352] Law has been understood as disengaging to the extent that it allows and even encourages parties to pursue their own autonomous self-interests free from the involvement or interference of others—hence, the concept of "rights."[353] It has been considered objective in that it exists apart from, and is supposedly applied regardless of, the feelings or whims of individual judges or lawyers or their personal attitudes towards the disputing parties.[354] It has been held to be determinate insofar as it has been assumed that proper legal analysis leads to "one right answer."[355] Traditional American jurisprudence has conceived of law as timeless insofar as its core principles—if not always its specific rules—remain constant.[356] Law has been viewed as systematic in that its rules and principles are presumed to be related to each other in a coherent deductive pattern.[357] Finally, traditional lawyers and legal scholars have thought of law as differentiatory in that they have attributed much of its success to depend on its ability to make and maintain sharp distinctions between various situations, categories, and rules.[358]

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[348] In the words of one woman looking back on the early history of women in American law teaching:

> The trick was to be able to be just like the men—whether that meant in our behaviors, demeanors, emotions, values, assumptions, styles of thinking or styles of relating. If our femaleness showed through, or if we relied on our socialized natures for guidance about how to behave, react, interact or reason, we were presumed less competent, disqualified, and necessarily less lawyerly.

Leslie Bender, *For Mary Joe Frug: Empowering Women Law Professors*, 6 WIS. WOMEN'S L.J. 1, 12-13 (1991).

[349] "Marginalized groups may lack the inclination to engage in certain ways of thinking and writing because we learn early that such work may not be recognized or valued." BELL HOOKS, YEARNING: RACE GENDER AND CULTURAL POLITICS 129 (1990).

[350] Recall, for example, the Realists of the 1930s and 1940s, the adherents of Critical Legal Studies in the 1970s and 1980s, not to mention today's feminist and critical race scholars.

[351] On the rapid development of this understanding of law in the late nineteenth century, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, at 9-20 (1992).

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[352] *See, e.g.*, Christopher T. Wonnell, *The Abstract Character of Contract Law*, 22 CONN. L. REV. 437 (1990). On the "reasonable man," see, for example, Harry S. Gerla, *The "Reasonableness" Standard in the Law of Negligence: Can Abstract Values Receive Their Due?*, 15 U. DAYTON L. REV. 19 (1990).

[353] For a recent discussion of this aspect of traditional legal thought that rejects the notion that "autonomy" necessarily leads to "atomism," see Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992).

[354] *See generally* Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445 (1984); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Kent Greenawalt, *Law and Objectivity: How People Are Treated*, 8 CRIM. JUS. ETHICS 31 (1989).

[355] On the nineteenth-century roots of this idea, see Grey, *supra* note 163, at 7. Although it is currently out of favor in many quarters of the academic community, this notion has been stoutly defended, and to some extent reanimated, by Ronald Dworkin. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978).

[356] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

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> For many jurists . . . the central task of jurisprudence appears as the analysis and systematic exposition of legal rules and precepts, and the deduction of the general principles and concepts that underlie them, and the way in which these may be built up into a logical and coherent scheme or system.

A.L. Epstein, *The Case Method in the Field of Law*, *in* THE CRAFT OF SOCIAL ANTHROPOLOGY 205, 208-09 (A.L. Epstein ed., 1967). On the systematizing, ordering predelictions of "classical" American legal thought, see Grey, *supra* note 163, at 8-10; Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. SOC. 3, 8-9 (1980).

[358] *See* HORWITZ, *supra* note 351, at 10-19; Kennedy, *supra* note 357, at 4-5.

Each of these qualities of law has been closely matched by a characteristic of vision, at least as American and other Western philosophers have encouraged us to understand visual "phenomenology." To begin, we have traditionally considered vision to be the ultimate abstract sense. Sight depends not on contact or proximity with concrete reality, but rather on withdrawal: "The best view is by no means the closest view; to get the proper view we take the proper distance, which may vary for different objects and different purposes, but which is always realized as a positive and not a defective feature in the phenomenal presence of the object."[359] To this extent, sight literally abstracts one from the world—certainly not completely, but more than the other senses.[360] Perhaps this is why "it is easier to be a visual spiritualist than a tactile one."[361] Regarded in a positive sense, visually induced abstraction facilitates generalization; indeed, our word for the ultimate generalization, a "theory," is derived from the Greek *theoria*, meaning "a seeing." In a negative sense, however, visual abstraction inhibits the appreciation of lifelike particularity.[362] After World War II, deafened veterans reported that their loss of hearing at first made the noisy world a peaceful place. In time, as they were forced to mediate more and more of their experience through vision, they found it to be lifeless and unreal.[363] Their original abstraction had become outright alienation.

Insofar as vision abstracts individuals from other individuals, we have generally regarded it as facilitating mutual disengagement. Well before one reaches the outer limits of visual (as opposed to aural or tactile) perception, the urge, the need, and sometimes even the ability to actively interact with one's potential interlocutor is reduced. Unlike the "feeler" and the "hearer," the seer is moreover not physically affected by the individual perceived. In this context, seers readily assume an uninvolved, uncommitted, indifferent, literally voyeuristic stance towards one another.[364] Passive, observing individuals become more aware of themselves as autonomous "selves," while regarding their observed counterparts as distinct "others."[365] The capacity of vision to separate (even create) "self" and "other" was most effectively dramatized in fifteenth- and sixteenth-century Europe, when artists routinely set transparent grids between themselves and their subjects so that the latter could be drawn according to the purely visual dictates of linear perspective. In this context, "the self becomes a spectator ensconced behind his or her window on the world, . . . the body, now divorced from this self, becomes a specimen, and . . . the world . . . becomes a spectacle."[366] More recently, French psychologist Jacques Lacan has identified the onset of the self-concept in young children with the "mirror-stage": the developmental point at which the child recognizes itself—as separated Other—in the mirror.[367]

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[359] JONAS, *supra* note 108, at 149-50.

[360] "Vision is that sense which places the world at greatest remove." Keller & Grontworski, *supra* note 87, at 213.

[361] BERLEANT, *supra* note 51, at 39.

[362] From a Platonic perspective, it might be said that "[v]ision connects us to truth as it distances us from the corporeal." Keller & Grontworski, *supra* note 87, at 209.

[363] TUAN, *supra* note 49, at 118; *see also* Clemens E. Benda, *Language, Consciousness and Problems of Existential Analysis*, 14 AM. J. PSYCHOTHERAPY 259, 262 (1960) (positing that "when sound is eliminated from our experience, it becomes clear how inadequate and ambiguous is the [purely] visual experience").

[364] *See supra* note 223 and accompanying text.

We have similarly associated vision with objectivity. The visually distanced and disengaged seer is able to contemplate other things or persons without being burdened by the emotions or attitudes that might be encouraged by physical proximity.[368] Things can supposedly be seen for themselves, not as the seer subjectively reacts to them or to their personal context.[369] In the case of persons, what they are may be separated from who they are or what they think (or what is thought of them). Thus, the American artist Maurice Grosser has pointed out the physical and psychological difficulty of painting someone's portrait from within "touching distance."

> [A]t touching distance, the sitter's personality is too strong. The influence of the model on the painter is too powerful, too disturbing to the artist's necessary detachment, *touching distance* being not the position of visual rendition, but of motor reaction or some physical expression of sentiment, like fisticuffs, or the various acts of love.[370]

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[365] "Critics of the Cartesian skeptical tradition have long questioned vision as the Cartesian paradigm of perception, asking if sight, by its very nature, does not presume a detachment from the Other that is then solidified into separateness from the Other." O'Fallon & Ryan, *supra* note 22, at 897.

[366] ROBERT D. ROMANYSHYN, TECHNOLOGY AS SYMPTOM AND DREAM 31 (1989).

[367] JACQUES LACAN, *The Mirror Stage as Formative of the Function of the I as Revealed in Psychoanalytic Experience*, *in* ÉCRITS: A SELECTION 1 (Alan Sheridan trans., W.W. Norton & Co. 1977) (1966). As a matter of history, it is interesting that the popularization of the mirror in the twelfth century coincided not only with the rise of self-portraiture, but with the rise of autobiography as a developed literary form. *See* Martin Stevens, *The Performing Self in Twelfth-Century Culture*, 9 VIATOR 193 (1978).

[368] "[T]he visual system allows for a more or less detached contemplation . . . ." DAVID CHIDESTER, WORD AND LIGHT: SEEING, HEARING, AND RELIGIOUS DISCOURSE 11 (1992).

[369] JONAS, *supra* note 108, at 147-48.

[370] *Quoted in* EDWARD T. HALL, THE HIDDEN DIMENSION 72 (1966).

It is this "objective" quality of sight that has made it the ultimate scientific and "intellectual" sense.[371] The same quality, however, has occasionally rendered sight problematic in social situations where subjectivity and even empathy are valued. Unadulterated, unmitigated looking—precisely because it "objectifies"—is generally considered antisocial. Children are taught, "Don't stare." As Walter Ong has noted, "[l]ooking fixedly at another person has normally the effect of reducing him to a surface, a non-interior, and thus to the status of a thing."[372]

The determinacy of sight has been expressed in two ways. In the first place, sight has been said to be "single-perspectival." Vision takes in one visual perspective or vista at a time, which it instantly resolves to a single, unique point—the "point of view" (a point which, by being duplicated in a painting or text, may moreover be imposed on another observer).[373] Presuming that one is looking straight ahead, other potential perspectives—alternative vistas behind, beside, above, or below—are invisible, discoverable only with the subsequent intervention and assistance of other faculties (particularly movement, which would allow one to appreciate different perspectives by circumnavigating an object). To this extent, the purely visual world is always a single truth before our eyes. Like the photograph, it is tyrannically definitive, implicitly rejecting all other views as wrong or illegitimate. The phrase "that is exactly the way it looks to me" rapidly becomes "this is the place to see it from."[374] Vision has also been considered determinate in light of the manner in which colors—primary constituents of the visual world—routinely interact; when combined in the same space, they lose their original hues and become one entirely new entity.[375] By virtue of both these phenomena, the visual sense has been deemed relatively incapable of supporting existential diversity.

Sight has been thought timeless because it is not dependent upon the dynamic unfolding of events. Unlike hearing, which depends on the next sound or phoneme to form a coherent noise or word, or touch, which depends on the next feeling to discern a shape, sight need not wait upon the next image to bring meaning. As Hans Jonas has explained:

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[371] LOWE, *supra* note 80, at 7.

[372] ONG, *supra* note 75, at 166.

[373] "The involuntary and subliminal character of [the] . . . 'fixed point of view' depends on the isolation of the visual factor in experience." MCLUHAN, *supra* note 44, at 127.

[374] Jacqueline Tyrwhitt, *The Moving Eye*, *in* EXPLORATIONS IN COMMUNICATIONS, *supra* note 45, at 90, 91-92.

[375] ACKERMAN, *supra* note 166, at 219.

> All other senses construct their perceptual "unities of a manifold" out of a temporal sequence of sensations which are in themselves time-bound and nonspatial. Their synthesis therefore, ever unfinished and depending on memory, must move along with the actual progress of the sensations, each of which fills the now of the sense from moment to moment with its own fugitive quality.[376]

Vision can extract a tremendous amount of information from a static, literally timeless scene. Indeed, rapid change in the environment may make the visual extraction of information more difficult.[377] Vision may therefore be said to demand a certain degree of constancy or "being"; in this sense, it peculiarly "lends itself to a static conception of 'eternal truths.'"[378]

Largely because we have regarded sight as timeless, we have regarded it as the principal systematizing sense. It is supposed to be the sense most capable of appreciating or identifying the constant relations between different elements that make up the idea of "system" (as opposed to, say, the more dynamic idea of "process"). The visual bias of our idea of system was implicitly understood as early as the eighteenth century, when Scottish philosopher David Hume commented that "to deliver a system in conversation scarcely appears natural."[379] One modern student of sight has observed, somewhat more directly, that "[a] view comprehends many things juxtaposed."[380] A second has noted that "objects are visible at the same time, and they are stable long enough for us to apprehend their relationship to each other."[381] A third scholar has concluded that "[v]ision involves the discernment of patterns, configurations, spatial relationships—in other words, the recognition of order."[382]

Finally, we have held sight to be highly differentiatory. All the senses can make distinctions between the presence and absence of stimuli or between different types of stimuli. Vision, however, excels at identifying very fine, very precise distinctions. Visible shapes enable us to distinguish one object from another; visible colors may likewise help us to distinguish objects, or the various parts of objects; visible lines allow us to discern distinct zones and territories. The distinguishing aspect of vision was already evident to Aristotle in the fourth century B.C.: "We prefer seeing to everything else [because] . . . , most of all senses, sight makes us know and brings to light the many differences between things."[383] More recently, French phenomenologist Maurice Merleau-Ponty has asserted that vision is a "dissecting" sense, while Walter Ong has described distinctness and "taking apart" (which he notably associates with the thinking of Descartes) as aspects of a "visual ideal."[384]

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[376] JONAS, *supra* note 108, at 136.

[377] "To view something closely by sight, we wish to stop it for inspection, and we do so when we can, studying even motion itself, or so we pretend, in a series of still shots." ONG, *supra* note 75, at 41.

[378] Keller & Grontworski, *supra* note 87, at 213; *see also* JONAS, *supra* note 108, at 145 ("Only sight . . . provides the sensual basis on which the mind may conceive the idea of the eternal, that which never changes and is always present.").

[379] *Quoted in* COX, *supra* note 191, at 102.

[380] JONAS, *supra* note 108, at 136.

[381] TUAN, *supra* note 49, at 118.

[382] CHIDESTER, *supra* note 368, at 11.

The similarity between the values of traditional American legal theory and the values we have traditionally associated with sight is not coincidental. In the first place, traditional American legal theory was developed and has prospered in a society which has itself been highly visualist.[385] This broad cultural orientation has made American law susceptible not only to the techniques and the language of sight, but also to its phenomenological biases. In other words, with American culture dominated by a sense that is understood as fostering (if not necessarily creating) abstraction, disengagement, objectivity, timelessness, system, and differentiation, American legal theory—necessarily operating within that culture—has been drawn to many of the same values.

In the second place, traditional American legal theory has been largely articulated and elaborated by individuals from American gender, racial, ethnic, and religious groups whose relative visuality[386] has arguably biased them towards the values that visuality has been held to favor. The historically greater visuality of American men's culture may thus have prompted American men (as a group) to claim a special attraction for, and/or be particularly associated by others with abstraction, disengagement, and objectivity,[387] even if American men's visuality has neither afforded them a monopoly over the invocation or application of those values[388] nor prevented many men from adopting different perspectives.[389] The historically greater visuality of white American culture may have encouraged white Americans (as a group) to ascribe to themselves, and/or be largely identified by others with the same norms,[390] although white Americans' relative visuality has certainly not made those norms either their exclusive property[391] or their universal preference.[392] The relative visuality of Protestant culture may equally have biased American Protestants (as a group) towards disengagement, objectivity, and system, both in their own eyes and in the eyes of their religious and social critics.[393] The long-standing numerical and political domination of both the American legal

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[383] ARISTOTLE, *Metaphysics* 980a (W.D. Ross trans.), *in* INTRODUCTION TO ARISTOTLE, *supra* note 116, at 243, 277.

[384] ONG, *supra* note 75, at 129.

[385] *See supra* part II.A (*Seeing Culture*).

[386] *See supra* part II.B (*Visuality and Power*).

[387] On the general association of these values with men or men's culture (at least within the modern Western or American tradition), see GILLIGAN, *supra* note 255; Susan Bordo, *The Cartesian Masculinization of Thought*, 11 SIGNS 439 (1986); Evelyn F. Keller, *Gender and Science*, *in* FEMINIST RESEARCH METHODS: EXEMPLARY READINGS IN THE SOCIAL

SCIENCES, *supra* note 246, at 41. For examples of feminist legal writing implicitly or explicitly alleging the same association—in most instances, preliminary to a critique of "men's" values and the articulation of "feminist" alternatives—see Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987); MacKinnon, *supra* note 244; Matsuda, *supra* note 244; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Susan H. Williams, *Feminist Legal Epistemology*, 8 BERKELEY WOMEN'S L.J. 63 (1993).

[388] As Joan Williams has pointed out, "feminists of difference submerge the fact that the [female] thinkers who have developed the new epistemology [that has challenged these values] have, by and large, been cerebral and detached in the extreme." Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 805 (1989); *see also* Frances Olsen, *Feminist Theory in Grand Style*, 89 COLUM. L. REV. 1147, 1168-74 (1989) (reviewing CATHERINE A. MACKINNON, FEMINISM UNMODIFIED (1987)) (discussing the book as an instance of abstract, disengaged, and objective "grand theory").

[389] Williams, *supra* note 388, at 806. This would seem to undermine the contention that any particular values are "male" per se.

[390] *See generally* KOCHMAN, *supra* note 287, at 18-34, 106-29. For examples of African American legal writing that implicitly or explicitly associate all or some of these norms with white American culture (for the most part, as a preliminary step towards challenging those norms from a black cultural perspective), see John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992); Jerome M. Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991); Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992).

[391] Witness the large body of African American legal scholarship framed in "traditional" style that reflects and indeed indulges the norms of abstraction, disengagement, and detachment.

[392] See, for example, the "critical" works of the white American legal theorists discussed in part III, *infra* (*"Fair Hearings"*).

[393] *See, e.g.*, ONG, *supra* note 75, at 283-86. Following American sociologist Robert Merton, a number of scholars have suggested that the Protestant bias towards these values created a North European, and eventually an American, intellectual climate in which science and scientism naturally flourished. For a recent review and critique of the "Merton thesis," see JOHN H. BROOKE, SCIENCE AND RELIGION: SOME HISTORICAL PERSPECTIVES 109-16 (1991).

community and the American legal professoriate by members of these visualist groups has in turn helped make "visualist" virtues central to traditional American legal theory.

Third, traditional American legal thought has been primarily set down and spread in a visual medium—writing—the use of which may be said to have phenomenologically encouraged law's conformity to visual values. As we have recently been reminded, "Law is bound by its form. In important ways, [it] is the product of its methods of creation, transmission, and execution."[394] American legal thinkers who have historically depended on writing for so much of their professional inspiration, information, and communication may have been incidentally led by writing to endorse abstraction, disengagement, and other such visual norms.[395]

The mutual affinity between vision and traditional American legal theory that these three circumstances have helped create has been reflected most generally in the tendency of traditional legal scholars to embrace forms of legal scholarship that are "visualist," or are, at most, minimally reminiscent of aural styles and formats. Law's abstraction and objectivity, for instance, are more readily indulged in analysis than in story or poem; law's disengagement and system are more effectively communicated in an essay than in a dialogue. In turn, the jurisprudential use of visualist analysis and essay—by precluding or preempting more aurally oriented styles of presentation[396] which might allow concrete, subjective, relational, or process-based values to come to the fore—indirectly supports, and even promotes, the notion that law is abstract, objective, disengaged, and systematic.

By the same token, vision has been a natural referent for legal figures of speech used by adherents of traditional legal theory. What better sense metaphorically to communicate (and reinforce) the systematic nature of traditional law than the sense by which systems are said to be most readily perceived? In this context, visual legal metaphors like "seamless web" or "body of law" seem truly tailor-made. Likewise, what better way to communicate law's objective nature than by metaphorically evoking a form of sensory experience that we consider biased towards objectivity?[397] In this light, referring to adjudication visually as "judicial review" seems highly appropriate. Trying to communicate the same legal qualities by reference to, say, aural or tactile experience might be phenomenologically awkward and less effective, if not actually self-defeating. At the same time, the most casual use of visual legal metaphors can incidentally reinforce the phenomenologically compatible values of orthodox jurisprudence: saying that a constitutional principle is a "fixed star" or that an area of concurrent jurisdiction is a "zone of twilight" indirectly supports and even encourages the belief that law is abstract, static, and disengaged from concrete human experience.[398] To this point, American lawyers may rarely have reflected on these phenomenological associations between law and vision, but the traditional American preference for visual legal language suggests that, at some level, the associations have nonetheless been understood.

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[394] Ronald K.L. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509, 509 (1992).

[395] On the written word's phenomenological contribution to the development of abstraction, disengagement, and system as primary characteristics of Western law and legal thought, see M. ETHAN KATSH, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW (1989) (especially ch. 6). *See also* JACK GOODY, THE LOGIC OF WRITING AND THE ORGANIZATION OF SOCIETY 165-67 (1986).

[396] *E.g.*, story, poetry. *See* discussion *infra* part III.C (*Law and the Phenomenology of Sound*).

III. "FAIR HEARINGS": AURALITY AND THE NEW LEGAL LANGUAGE

> *A turn to the* auditory dimension *is . . . more than a simple changing of variables. It begins as a deliberate decentering of a dominant tradition in order to discover what may be missing as a result of the traditional double reduction of vision as the main variable and metaphor.*[399]

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[397] Note, for example, the striking correlation between the idea of legal objectivity/impartiality and the use of visually evocative language on the one hand, and the idea of partiality/subjectivity and the use of aurally evocative language on the other in this excerpt from a well-known law review article:

> The idea of impartiality implies human access to a view beyond human experience, a "God's eye" point of view. Not only do humans lack this inhuman perspective, but humans who claim it are untruthful, trying to exercise power to cut off conversation and debate. . . . [A] single absolute truth would mean the end of human discourse, but . . . we are happily saved from that end because any truth, once uttered, becomes immediately one truth among many, subject to more discourse and dispute.

Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 75 (1987) (footnotes omitted). Carol Gilligan and her colleagues might have been referring to precisely this statement when they observed that "the talk of separation with its imagery of seeing . . . suddenly yields to a different language for describing connection and closeness with others, a language of talking, of listening . . . ." Gilligan et al., *supra* note 255, at 316.

[398] Martha Minow came to the edge of this point in 1988 when, in a footnote, she suggested that in legal discourse, even her casual use of "visual metaphors, like 'glimpse,' 'see,' and 'reveal,' despite my intentions, may invoke positivist conceptions of objectivity and unmediated reality, graspable through perception." Minow, *supra* note 397, at 68 n.270.

[399] IHDE, *supra* note 81, at 14.

The growing popularity of aural metaphors in contemporary American legal discourse has already drawn some comment from observers, but so far it has attracted only the most superficial of explanations.[400] In this section of the Article I will try to make amends for this unsatisfactory state of affairs by arguing that the recent increase in aural figures of legal speech may be attributed to three fundamental factors that complement those underlying the traditional popularity of visual metaphors in American legal language. First, just as our visual legal metaphors have been a product of our culture's traditional bias towards vision and visual experience, our increased inclination towards aural legal metaphors is a function of the increasing attraction of sound and aural experience in a society that is becoming more dependent on aural technologies. Second, just as visual legal metaphors have traditionally been preferred in an American legal community dominated by members of gender, racial, ethnic, and religious groups which have been more writing-based and hence relatively more respectful of visuality, aural legal metaphors are coming into greater favor as a growing number of American law professors from gender, racial, ethnic, and religious groups which are less writing-oriented and hence relatively more respectful of aurality draw on their own group experiences and values for scholarly inspiration. Third, just as the use of visual legal metaphors has been encouraged by the perceived fit between traditional legal philosophy and our phenomenological understanding of sight, the use of aural legal metaphors is being encouraged by the perceived fit between what might loosely be termed a "critical" legal philosophy and our phenomenological understanding of hearing. In the next three subsections of this Article, I will explore each of these factors in detail.

A. *Hearing Culture*

In the midst of a culture saturated with printed and electronic texts and bombarded by images from television and movies, it cannot be denied that seeing remains at the center of American sensory experience. There is nonetheless evidence to suggest that in the late twentieth century we[401] are increasingly fascinated with—

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[400] *E.g.*, Massuro, *supra* note 25, at 2100 n.11 (suggesting that the popularity of "voice" in legal writing "likely stems from Carol Gilligan's rather astonishingly popular work, *In A Different Voice*."). Certainly Gilligan's work is not irrelevant to this trend, but I believe that it is more a symptom of change than a cause.

[401] In this section of the paper, "we" generally refers to Americans as a whole, not Americans as members of any particular gender, racial, ethnic, or religious group. *See supra* note 46.

and in a few instances, are even becoming biased towards—aural expression and experience.[402] This development has arguably encouraged a significant number of American legal scholars to use aural figures of speech to define and describe a variety of legal ideas and procedures.

Some manifestations of the new American aurality are obvious; others are not. A growing number of Americans prefer to experience language aurally rather than visually.[403] A significant number of us do not read the news in the daily press anymore; instead, we listen to (and on TV, even watch) it being read aloud to us.[404] Long the mainstay of American visual culture, books are still very popular,[405] but the market for so-called "talking books" (or "audiobooks") read by noted entertainers or personages is growing at a phenomenal rate.[406] Popular magazines such as *Newsweek* and *People* are appearing in separate "audio" versions.[407] We share an unprecedented passion for music of all sorts.[408] We are taking renewed interest in poetry readings and oral storytelling.[409] We send greeting cards which play melodies for their recipients; we buy toys which talk and even "read" to our children. An increasing number of young Americans of both sexes are highlighting their ears with studs or earrings.[410] Even contemporary eroticism is no longer a function of sight *simpliciter*: Americans have made 1-900 "aural sex" telephone services into a billion-dollar industry.[411]

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[402] *See* ONG, *supra* note 174, at 136-38 (suggesting an aural renewal which he terms "secondary orality"); CYNTHIA OZICK, *The Question of Our Speech: The Return to Aural Culture*, *in* METAPHOR AND MEMORY 146 (1991); STEPHEN TOULMIN, COSMOPOLIS: THE HIDDEN AGENDA OF MODERNITY 186-88 (1990).

[403] Robin T. Lakoff, *Some of My Favorite Writers Are Literate: The Mingling of Oral and Literate Strategies in Written Communication*, *in* SPOKEN AND WRITTEN LANGUAGE: EXPLORING ORALITY AND LITERACY 239, 242 (Deborah Tannen ed., 1982).

[404] In this sense we are becoming not so much "illiterate" but "aliterate"; an "aliterate" being "a person who knows how to read but who doesn't choose to read." Bernice E. Cullinan, *Inviting Readers to Literature*, *in* CHILDREN'S LITERATURE IN THE READING PROGRAM 2, 11 (Bernice E. Cullinan ed., 1987).

[405] Roger Cohen, *If the Written Word Is Really Dying, Who Is Patronizing the 'Superstores'?*, N.Y. TIMES, Sept. 30, 1990, at E6. At the same time, it has been asserted that "[e]ighty percent of the books in this country are read by about 10% of the people." JANE M. HEALY, ENDANGERED MINDS: WHY OUR CHILDREN DON'T THINK 23 (1990).

[406] Preston Hoffman, *A Change of Voice: The Art of the Spoken Word*, LIBR. J., Nov. 15, 1991, at 39, 39-43; Richard Zoglin, *A Real Tape Turner*, TIME, Aug. 29, 1994, at 73 (noting that "[r]etail sales for audio books . . . reached $1.2 billion in 1993, up 40% from the year before"); *see also* SVEN BIRKERTS, *Close Listening*, *in* THE GUTENBERG ELEGIES: THE FATE OF READING IN AN ELECTRONIC AGE 141 (1994) (considering the implications of listening to literature, instead of reading it).

[407] Liz Horton, *Magazines Bid for Ears as Well as Eyes of Readers*, FOLIO, Feb. 1992, at 43.

[408] "This is the age of music . . . . Music was not . . . that important for the generation of students preceding the current one." ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND 68-70 (1987).

[409] Evy H. Anderson, *The Spell of the Storyteller*, PUBLISHERS WKLY., Feb. 15, 1993, at 28; Glenn Collins, *When the Writers Read, the Readers Listen*, N.Y. TIMES, Oct. 23, 1989, at C15; Diana J. Schemo, *After the Beats: A New Generation Raises Its Voice in Poetry*, N.Y. TIMES, Sept. 26, 1994, at B1.

With sound thus in the ascendant, the silence that has historically been a concomitant of American visuality seems to be in cultural retreat. More and more of us find that we want (or need) aural distraction when we are reading, exercising, relaxing, or even trying to go to sleep.[412] Muzak accompanies us while we make our rounds at the supermarket; many of us publicly despise it, but many of us also miss it when it isn't there. The traditional sanctuaries of silence—libraries, museums, and art galleries—are slowly being invaded by cassette tapes,[413] listening equipment, voice-based exhibits, and artworks which literally speak for themselves.[414] At the movie theater, more and more of us accustomed to the constant electronic buzz of modern life are unwilling, or unable, to be quiet.[415] We cannot even take psychic refuge in the "silent" reaches of Newtonian space: thanks to modern radio astronomy, we are newly conscious of the fact that far from being still, the universe sputters with the static of the stars.

Our social identities are increasingly founded upon aural affinities and differences. As we come into more frequent aural contact with one another via telephone, radio, and television, we are more aware of accents. In a high-visualist culture, accents tend to be but a secondary basis of differentiation, and hence only a secondary basis for discrimination. Today, however, as understanding another person's speech becomes more and more important to effective interpersonal communication, accent-based differentiation and discrimination appear to be on the rise.[416] At the same time, we are becoming more interested in and more sensitive towards the plight of the deaf.[417] In a more aurally oriented society, we may slowly be realizing that not being able to hear can be a problem of the same fundamentality as is not being able to see in a visualist culture. To the extent that our changing circumstances prompt us to improve the social and legal situation of deaf people,[418] the new aurality may have positive as well as negative social consequences.

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[410] Corey Seymour, *Now Ear This*, ROLLING STONE, Aug. 5, 1993, at 59. In a fascinating article on the Suya Indians of central Brazil, anthropologist Anthony Seeger has suggested a connection between a society's habits of bodily ornamentation on the one hand and its sensory bias on the other. Anthony Seeger, *The Meaning of Body Ornaments: A Suya Example*, 14 ETHNOLOGY 211 (1975). The Suyas decorate the mouth and ears, which Seeger interprets as evidence of their aurality. *Id.* at 212. If he is right, then the American practice referred to in the text may well be something more than a passing cosmetic trend.

[411] *See generally* Thomas J. Lo, *The Supreme Court's Recent Stand on Dial-a-Porn Regulations: "Honey, I Shrunk the First Amendment!,"* 19 W. ST. U. L. REV. 431 (1992). In 1988, phone sex services grossed $2.4 billion. *Id.* at 433 n.13.

[412] TONY SCHWARTZ, THE RESPONSIVE CHORD 51 (1973).

[413] For a discussion of the potential impact of "talking books" on the policy and mission of traditional libraries, see Virgil L.P. Blake, *Something New Has Been Added: Aural Literacy and Libraries*, *in* INFORMATION LITERACIES FOR THE TWENTY-FIRST CENTURY 203 (Virgil L.P. Blake & Renee Tjoumas eds., 1990).

[414] Judy K. C. Van Wagner, *Sound Art*, ARTS MAG., Sept. 1984, at 19.

[415] Thomas J. Meyer, *Go to the Movies. And Shut Up!*, N.Y. TIMES, Sept. 11, 1991, at A27; Richard Sandomir, *A Tragedy of Manners at the Movies*, N.Y. TIMES, June 5, 1992, at C1.

Our everyday language is picking up a growing number of aural or aurally related terms. The process of auralization accelerated noticeably in the 1960s, when American youth began to "tune in" and "turn on."[419] Today, when we make a proposal to someone, we first "sound them out." An appealing idea or proposal "sounds good" even if it is written down. Jargon of all sorts is routinely labelled as a form of "speaking," along lines first suggested by George Orwell ("doublespeak," "Newspeak") in his 1949 novel *Nineteen Eighty-Four*: thus, "businesspeak," "computerspeak," and "sciencespeak."[420] Psychological or technical language is notably "psychobabble" or "technobabble."[421] A popular term is a "buzzword," evoking the noise of everyone speaking it at the same time.[422] In conversation, acknowledgement (if not necessarily agreement) seems increasingly to be communicated by the phrase "I hear you" as opposed to "I see." Ignorance is increasingly portrayed in aural as well as visual terms. Where we were once overwhelmingly inclined to "turn a blind eye" to something, we now also "turn a deaf ear."[423] When two individuals or groups refuse to pay attention to one other, they are analogously engaged in a "dialogue of the deaf."

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[416] Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1324, 1333-48 (1991). *See, e.g.*, Fragrante v. Honolulu, 699 F. Supp. 1429, 1431 (1987) (where a person with what was described as a "heavy Filipino accent" was denied employment on the grounds that he "[w]ould be difficult to understand over the telephone").

[417] *See, e.g.*, HARLAN LANE, WHEN THE MIND HEARS: A HISTORY OF THE DEAF (1984); OLIVER SACKS, SEEING VOICES: A JOURNEY INTO THE WORLD OF THE DEAF (1989); Michele-Lee Berko, Comment, *Preserving the Sixth Amendment Rights of the Deaf Criminal Defendant*, 97 DICK. L. REV. 101 (1992).

[418] *See, e.g.*, Randy Lee, *Equal Protection and a Deaf Person's Right to Serve as a Juror*, 17 N.Y.U. REV. L. & SOC. CHANGE 81 (1989-1990) (discussing Pennsylvania's success at incorporating deaf individuals in juries).

[419] *See* SCHWARTZ, *supra* note 412, at 9.

[420] Mary G. Porter & I. Willis Russell, *Among the New Words*, 59 AM. SPEECH 159, 163-64 (1984).

[421] SARA TULLOCH, THE OXFORD DICTIONARY OF NEW WORDS 22 (1991); Fred Shapiro, *Coinage of* Psychobabble, 59 AM. SPEECH 373 (1984).

[422] TULLOCH, *supra* note 421, at 124.

Not even writing has been immune from the new aurality. The style of written language in newspapers, magazines, and even scholarly books is increasingly dependent on aural conventions.[424] Contemporary authors frequently refer to themselves in the first person as if they were speaking to their readers face-to-face.[425] The written use of contractions ("can't," "don't," etc.), once stylistically limited to conversation, seems to be on the rise. The written depiction of conversation itself is becoming noticeably more "true to life" with the inscription of pauses, false starts, mistakes, and so on.[426] Novelists seem increasingly drawn to aural storytelling as a central literary theme or event.[427] Many expository writings are being marketed as opportunities for "listening," presentations of "voice," or exercises in "conversation" that promise more intimate contact with a subject.[428] Nonfiction works are again appearing in

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[423] Perhaps not surprisingly, the latter phrase is actually the older of the two, having been recorded as early as the fifteenth century. CHRISTINE AMMER, HAVE A NICE DAY—NO PROBLEM!: A DICTIONARY OF CLICHÉS 384 (1992).

[424] Lakoff, *supra* note 403, at 245; *see also* DANIEL J. BOORSTIN, *The Decline of Grammar: The Colloquial Conquers the Classroom, in* THE AMERICANS: THE DEMOCRATIC EXPERIENCE 451 (1973).

[425] Ruth Behar, *Dare We Say 'I'? Bringing the Personal into Scholarship*, CHRON. OF HIGHER EDUC., June 29, 1994, at B1.

[426] Lakoff, *supra* note 403, at 254-55.

[427] Clayton, *supra* note 294, at 376 (citing as examples Paul Auster, *Moon Palace* (1989); John Irving, *The World According to Garp* (1978); Cynthia Ozick, *The Messiah of Stockholm* (1987); Philip Roth, *The Counterlife* (1986) and other works).

[428] For recent instances of writing presented as an opportunity for "listening," see G.R.F. FERRARI, LISTENING TO THE CICADAS: A STUDY IN PLATO'S *PHAEDRUS* (1987); PETER D. KRAMER, LISTENING TO PROZAC (1992); DAVID LAMB, A SENSE OF PLACE: LISTENING TO AMERICANS (1993); THOMAS NEWKIRK, LISTENING IN: CHILDREN TALK ABOUT BOOKS (AND OTHER THINGS) (1992); MICKEY PEARLMAN, LISTEN TO THEIR VOICES: TWENTY INTERVIEWS WITH WOMEN WHO WRITE (1993); BRIAN STOCK, LISTENING FOR THE TEXT: ON THE USES OF THE PAST (1990); WILLIAM L. SULLIVAN, LISTENING FOR COYOTE: A WALK ACROSS OREGON'S WILDERNESS (1988).

For recent instances of writing presented as "voice," see DANIEL L. ALKON, MEMORY'S VOICE: DECIPHERING THE MIND-BRAIN CODE (1992); ROBERT A. BEAUREGARD, VOICES OF DECLINE: THE POSTWAR FATE OF US CITIES (1993); CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (Robert D. Bullard ed., 1993); IMMIGRANT VOICES: NEW LIVES IN AMERICA, 1773-1986 (Thomas Dublin ed., 1993); SAUL D. SLAPIKOFF, CONSIDER AND HEAR ME: VOICES FROM PALESTINE AND ISRAEL (1993); VOICES FROM THE BATTLEFRONT: ACHIEVING CULTURAL EQUITY (Marta M. Vega & Cheryll Y. Greene eds., 1993); VOICING OUR VISIONS: WRITINGS BY WOMEN ARTISTS (Mara R. Witzling ed., 1991).

For recent instances of writing presented as "conversation," see ANTHONY AVENI, CONVERSING WITH THE PLANETS: HOW SCIENCE AND MYTH INVENTED THE COSMOS (1992); WILLIAM H. CALVIN & GEORGE A. OJEMANN, CONVERSATIONS WITH NEIL'S dialogue form, probably in the hope of giving their contents something of the immediacy and interactivity generally associated with the spoken word.[429] A variety of commentators and critics have even begun to argue that writing (and reading) are themselves metaphorically dialogic (if not yet actually aural) processes, and that the written "text" is not so much a thing as an ongoing negotiation of meaning between writer and reader, much as a conversation is between speaker and listener.

Contemporary American law reflects the new aurality in a variety of ways. Of course, aurality is no more dominant in American law than it is in American life: visual habits and metaphors continue to permeate both the legal profession and the legal professoriate. What we are talking about here is an emergent trend towards taking sound (and aural experience) more seriously. It must also be emphasized that not all of law's current aurality is the product of recent change. Despite the visuality that has traditionally dominated the surrounding culture, American lawyers and jurists have never altogether abandoned faith in nor lost all familiarity with speech[430] and aural styles.[431] American law is nonetheless in the midst of an aural revival. Appellate judges are

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BRAIN: THE NEURAL NATURE OF THOUGHT AND LANGUAGE (1994); CONVERSATIONS ON COMMUNICATION ETHICS (Karen J. Greenberg ed., 1991); JAY L. ROBINSON, CONVERSATIONS ON THE WRITTEN WORD: ESSAYS ON LANGUAGE AND LITERACY (1990); EDWARD TELLER ET AL., CONVERSATIONS ON THE DARK SIDE OF PHYSICS (1991).

[429] For recent examples of constructed nonfiction dialogues, see WALTER ADAMS & JAMES W. BROCK, ADAM SMITH GOES TO MOSCOW: A DIALOGUE ON RADICAL REFORM (1993); GLOBAL VOICES: DIALOGUES IN INTERNATIONAL RELATIONS (James N. Roseman ed., 1993); JANE JACOBS, SYSTEMS OF SURVIVAL: A DIALOGUE ON THE MORAL FOUNDATION OF CULTURE AND POLITICS (1992); MICHAEL J. KATZ, SOCRATES IN OCTOBER: DIALOGUES ON INCONDENSABLE COMPLEXITY (1987); DAVID B. MYERS, MARX AND NIETZSCHE: THE REMINISCENCES AND TRANSCRIPTS OF A NINETEENTH CENTURY JOURNALIST (1986); DAVID WEINBERGER, NUCLEAR DIALOGUES (1987); Alastair Fowler, *Writing Criticism and Making Poems*, 21 NEW LITERARY HIST. 1 (1989); Jerome McGann, *Revision, Rewriting, Rereading; or "An Error [Not] in* The Ambassadors," 64 AM. LITERATURE 95 (1992). Other recent nonfiction dialogues are transcripts of actual interviews. *See, e.g.*, BACKTALK: WOMEN WRITERS SPEAK OUT/INTERVIEWS WITH DONNA PERRY (Donna Perry ed., 1993); DAVID BRESKIN, INNER VIEWS: FILMMAKERS IN CONVERSATION (1992); NOAM CHOMSKY, CHRONICLES OF DISSENT: INTERVIEWS WITH DAVID BARSAMIAN (1992); BILL MOYERS, A WORLD OF IDEAS (Andie Tucher ed., 1989); ALEXANDER NEUBAUER, CONVERSATIONS ON WRITING FICTION: INTERVIEWS WITH THIRTEEN DISTINGUISHED TEACHERS OF FICTION WRITING IN AMERICA (1994). A similar growth in the number of published dialogues and transcripts has been noted in contemporary Japan. *See* Masao Miyoshi, *Thinking Aloud in Japan*, RARITAN, Fall 1989, at 29.

[430] Recall the central role of speech in discovery, cross-examination, and trial advocacy in general.

[431] Thus, "[t]here is nothing novel or mysterious about stories in law [as a whole]. Lawyers are storytellers . . . ." Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855, 1859 (1990).

considering greater roles for oral argument and oral decision.[432] Trial judges are more willing to accept parol evidence as a supplement to written contracts.[433] Judges at both levels have loosened the hearsay rules to give more scope to witnesses who want to report what they have heard from others, as opposed to what they have seen.[434] They are taking face-to-face oral defamation more seriously,[435] and if they have not necessarily rehabilitated slander as a primary civil wrong, they have extended the working definition of libel to include defamatory aural declarations made over radio or television.[436] They are more willing to indulge challenges to the apparent "plain meaning" of wills based on extrinsic evidence of what testators said.[437] By permitting televising of trials, they have even restored law to its historical place as a speaking presence in the community at large.[438]

In law schools, the value of aural teaching is being reasserted as an antidote to the intellectual privilege traditionally accorded written scholarship.[439] Oral examination has reemerged as a topic worthy of serious consideration.[440] More and more scholarly work is being done or disseminated at professional conferences and colloquia featuring speakers and organized discussions.[441] Inside and outside the conference hall, American legal academics are becoming noticeably more absorbed by the process and rhetoric of oral argument,[442] and concomitantly less obsessed by written appellate decisions.[443] We are taking more interest in studying and reproducing the actual talk (what Julius Getman calls the "real voice") of lawyers, litigants, and others participating or caught up in legal disputes.[444] We are more concerned with employment discrimination based on accent.[445] We are paying more attention to "alternative" types of dispute resolution (such as arbitration) which are oriented towards talking and listening more than writing and reading.[446] We are significantly more troubled by the social and emotional impact of oral insults and epithets.[447] We seem more willing to acknowledge "unwritten" sources of constitutional authority[448] and consider them as legitimate supplements to the written text.

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[432] Thomas E. Baker, *Proposed Intramural Reforms: What the U.S. Courts of Appeals Might Do to Help Themselves*, 25 ST. MARY'S L.J. 1321, 1337 (1994); Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 MD. L. REV. 732, 738-47 (1983).

[433] *See, e.g.*, George I. Wallach, *The Declining "Sanctity" of Written Contracts—Impact of the Uniform Commercial Code on the Parol Evidence Rule*, 44 MO. L. REV. 651 (1979).

[434] Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473 (1992).

[435] *See generally* Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527 (1993).

[436] LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION 82-86 (1978).

[437] Grey, *supra* note 63, at 224.

[438] It has been noted that with the advent of Court TV, "law comes to life; it becomes a living, breathing matter of debate and arguments." Joshua Lazerson, *Court TV: Can It Increase the Understanding of Law and the Legal Process?*, 76 JUDICATURE 57 (1992). Thanks to Simon & Schuster, members of the public can now buy audiotapes of their favorite broadcast cases. *See, e.g.*, THE MENENDEZ MURDER TRIAL (1 Courtroom Cassettes 1994).

[439] *See, e.g.*, John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343 (1989); Odeana R. Neal, *The Making of a Law Teacher*, 6 BERKELEY WOMEN'S L.J. 128, 132 (1990-91).

[440] Steven I. Friedland, *Towards the Legitimacy of Oral Examinations in American Legal Education*, 39 SYRACUSE L. REV. 627 (1988).

[441] For a light-hearted discussion of this phenomenon, see Rodolfo Sacco, *Organizing a Scholarly Congress*, 40 J. LEGAL EDUC. 279 (Arthur Rossett & Renata Paolini trans., 1990).

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[442] *See, e.g.*, Steven I. Friedland, *The Use of Appellate Case Report Analysis in Modern Legal Education: How Much Is Too Much?*, 10 NOVA L.J. 495 (1986) (suggesting, inter alia, that law schools pay more pedagogical attention to the skill of listening); McKenzie, *supra* note 25.

[443] *See, e.g.*, Meador, *supra* note 432; Stephen M. Simon & Bertrand Poritsky, *Judicial Trial Skills Training*, 37 J. LEGAL EDUC. 428 (1987).

[444] For example:

> This Article draws on over two years of interviews and discussions with people in the paper industry. It includes many quotations from employees to describe the dynamics, both internal and institutional, that make a cooperative, high performance strategy effective. Hearing the voices and listening to the experiences of those whose interests labor law and policy are intended to promote gives a unique and valuable perspective on labor law and labor relations.

Getman & Marshall, *supra* note 22, at 1806; *see also* JOHN M. CONLEY & WILLIAM O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990); Julius G. Getman, *A Story of Voice*, 55 U. PITT. L. REV. 973 (1994); Ann M. Gill, *The Oral Tradition of Gerry Spence in* Pring v. Penthouse, 17 SW. U. L. REV. 693 (1988); Sally E. Merry, *The Discourses of Mediation and the Power of Naming*, 2 YALE J.L. & HUMAN. 1 (1990); Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyers' Office*, 98 YALE L.J. 1663 (1989); and the more than 400 other articles and books collected under the heading "Spoken Language in Legal Settings," in Judith N. Levi, *Language and Law: A Bibliographic Guide to Social Science Research in the USA*, *in* 4 TEACHING RESOURCE BULL. 1 (1994).

[445] *See, e.g.*, Matsuda, *supra* note 416; Carolyn R. Matthews, Comment, *Accent: Legitimate Nondiscriminatory Reason or Permission to Discriminate*, 23 ARIZ. ST. L.J. 231 (1991); Mary E. Mullin, Comment, *Title VII: Help or Hindrance to the Accent Plaintiff?*, 19 W. ST. U. L. REV. 561 (1992).

[446] *See, e.g.*, Symposium, *Alternative Dispute Resolution*, 3 J. CONTEMP. LEGAL ISSUES 1 (1989-1990).

[447] *See* Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287 (1990).

[448] *See* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1974-75); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Grey, *supra* note 63; Wayne D. Moore, *Written and Unwritten Constitutional Law in the Founding Period: The Early New Jersey Cases*, 7 CONST. COMMENTARY 341 (1990); Sherry, *supra* note 206.

A significant number of today's law teachers are analogously fascinated by law's relationship with such traditionally or actually aural forms of expression as story,[449] rhetoric,[450] parable,[451] poetry,[452] speech (as dialogue, conversation, or simply talk),[453] and music.[454] Actual parables[455] and poems[456] are being quoted or reproduced in legal articles. Some adventurous law professors have taken to writing their own original stories,[457] parables,[458] and works of poetry.[459] An increasing number of law review pieces carry titles that evoke the titles or words of popular songs.[460] Some legal academics are even quoting and/or analyzing lyrics in the course of making their academic arguments.[461] Footnotes are citing conversations,[462] and, in at least one instance, the hitherto ubiquitous "See also" has (in the context of a reference to music) given way to "Hear also."[463] An increasing amount of legal scholarship is being framed in aurally evocative styles: first person "conversational" pronouns are becoming far more common, as are contractions.[464] For the first time in over two hundred years, legal dialogues are reappearing in strength as serious scholarly endeavors.[465] The student editors of a variety of law reviews are simultaneously showing an increased willingness to publish the oral transcripts of legal conferences and seminars as academically respectable articles.[466] They are also producing more symposium issues[467] and printing more exchanges of correspondence[468] in what may be seen as attempts to create at least a semblance of conversation and dialogue.[469]

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[449] *See, e.g.*, Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630 (1992); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword*: Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); Delgado, *supra* note 25; James R. Elkins, *The Stories We Tell Ourselves in Law*, 40 J. LEGAL EDUC. 47 (1990); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861 (1992); David R. Papke, *Discharge as Denouement: Appreciating the Storytelling of Appellate Opinions*, 40 J. LEGAL EDUC. 145 (1990); Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37 (1990); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

[450] *See, e.g.*, Jody Freeman, *Constitutive Rhetoric: Law as Literary Activity*, 14 HARV. WOMEN'S L.J. 305 (1991); White, *supra* note 23.

[451] *See, e.g.*, John J. Bonsignore, *In Parables: Teaching Through Parables*, 12 LEGAL STUD. FORUM 191 (1988); Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984).

[452] *See, e.g.*, Lawrence Joseph, *Theories of Poetry, Theories of Law*, 46 VAND. L. REV. 1227 (1993); James B. White, *The Judicial Opinion and the Poem: Ways of Reading, Ways of Life*, 82 MICH. L. REV. 1669 (1984).

[453] *See, e.g.*, Mary L. Ciampe, *The* I and Thou*: A New Dialogue for the Law*, 58 U. CIN. L. REV. 881 (1990); Amy H. Kastely, *Cicero's* De Legibus*: Law and Talking Justly Toward a Just Community*, 3 YALE J.L. & HUMAN. 1 (1991); Robert J. Lipkin, *Kibitzers, Fuzzies, and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 TUL. L. REV. 69 (1991).

[454] *See, e.g.*, Alfred C. Aman, Jr., *Studying Music, Learning Law: A Musical Perspective on Clinical Legal Education*, 13 CORNELL L. FORUM 8 (1987); Jennifer Jaff, *Law and Lawyer in Pop Music: A Reason for Self-Reflection*, 40 U. MIAMI L. REV. 659 (1986); Johnson & Scales, *supra* note 20; Gary Minda, *Phenomenology, Tina Turner and the Law*, 16 N.M. L. REV. 479 (1986); Peter R. Teachout, *The Soul of the Fugue: An Essay on Reading Fuller*, 70 MINN. L. REV. 1073 (1986); and other articles cited *infra* notes 567-77.

[455] *See, e.g.*, Martha G. Duncan, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*, 68 TUL. L. REV. 725, 753-54 (1991); Martha Minow, *Questioning Our Policies: Judge David L. Bazelon's Legacy for Mental Health Law*, 82 GEO. L.J. 7, 11 (1993); Daniel J.H. Greenwood, *Beyond Dworkin's Dominions: Investments, Memberships, the Tree of Life, and the Abortion Question*, 72 TEX. L. REV. 559, 612 (1994) (reviewing RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANSIA, AND INDIVIDUAL FREEDOM (1993)); and other examples cited *infra* note 607.

[456] *See, e.g.*, Alfieri, *supra* note 27, at 662 n.8; Ball, *supra* note 29, at 2295; David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 62 (1990); Ronald R. Garet, *Meaning and Ending*, 96 YALE L.J. 1801, 1811 (1987); and other examples cited *infra* note 606.

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[457] *See* Derrick Bell et al., *Racial Reflections: Dialogues in the Direction of Liberation*, 37 UCLA L. REV. 1037 (1990); Andrew W. McThenia, Jr., *Telling a Story About Storytelling*, 40 J. LEGAL EDUC. 67 (1990); and the many other examples cited *infra* note 610.

[458] *See, e.g.*, Emily F. Hartigan, *The Power of Language Beyond Words: Law as Invitation*, 26 HARV. C.R.-C.L. L. REV. 67, 76-77 (1991); and other examples cited *infra* note 613.

[459] *See, e.g.*, Louis J. Sirico, Jr., *Vietnam Haiku*, 74 CORNELL L. REV. 1228 (1989); and the other examples cited *infra* note 614. The new poetry has had a mixed reception. One scholar has graphically commented that "if Archibald MacLeish ever got a look at some of the political 'poetry' appearing in publications like the *Cornell Law Journal* [sic] he would puke." Arthur Austin, *Commentary on Jensen's Commentary on Commentary*, 24 CONN. L. REV. 175, 181 (1991).

[460] *See, e.g.*, Americo R. Cinquegrana, *Dancing in the Dark: Accepting the Invitation to Struggle in the Context of "Covert Action", the Iran-Contra Affair and the Intelligence Oversight Process*, 11 HOUS. J. INT'L L. 177 (1988); Katherine H. Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523 (1994); David Fraser, *What's Love Got to Do With It? Critical Legal Studies, Feminist Discourse, and the Ethic of Solidarity*, 11 HARV. WOMEN'S L.J. 53 (1988); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Steven H. Hobbs, *We Are Family: Changing Times, Changing Ideologies and Changing Law*, 14 CAP. U. L. REV. 511 (1985); Lisa Perrochet & Ugo Colella, *What a Difference a Day Makes: Age Presumptions, Child Psychology, and the Standard of Care Required of Children*, 24 PAC. L.J. 1323 (1993); W. Wylie Spicer, *Ch-Ch-Changes: Stumbling Toward the Reasonable Expectations of the Assured in Marine Insurance*, 66 TUL. L. REV. 457 (1991); Erik S. Jaffe, Note, *"She's Got Betty Davis['s] Eyes": Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clause*, 90 COLUM. L. REV. 528 (1990). For a list of similar articles that have recently appeared in Canadian law journals, see Vaughan Black & David Fraser, *Cites for Sore Ears (A Paper Moon)*, 16 DALHOUSIE L.J. 217, 218 n.7 (1993).

[461] *See, e.g.*, Ronald R. Garet, *Dancing to Music: An Interpretation of Mutuality*, 80 KY. L.J. 893, 925, 928 (1991-92); Philip N. Meyer, *"Fingers Pointing at the Moon": New Perspectives on Teaching Legal Writing and Analysis*, 25 CONN. L. REV. 777, 785, 788 (1993); Minda, *supra* note 454, at 489, 493; Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1695-99 (1990); and the other examples cited *infra* note 608. The most recent edition of the Harvard Bluebook notably contains guidelines (under the new heading "Sound Recordings") on how to reference popular songs, and provides sample cites to the works of David Bowie, the Beatles, and Kate Bush. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 124-25 (15th ed. 1991).

[462] *See, e.g.*, Ann Scales, *Feminist Legal Theory: Not So Scary*, 2 UCLA WOMEN'S L.J. 1, 9 n.26 (1992); Kim L. Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2073 n.3 (1989).

[463] James D. Gordon, *A Dialogue About the Doctrine of Consideration*, 75 CORNELL L. REV. 987, 993 n.48 (1990). For an analogous instance of "Hear e.g.," see C. Garrison Lepow, *Deconstructing Los Angeles or a Secret Fax from Magritte Regarding Postliterate Legal*

In light of all these developments, is it any wonder that American legal language—especially as articulated in the legal academy—has itself acquired a new aurality? If language and law are increasingly experienced or presented as things spoken or heard, it is surely sensible and even helpful to describe law as "voice," "rhetoric," or "discourse," and to perceive injustice as "silencing." If legal ideas and insights tend increasingly to emerge from face-to-face encounters, written dialogues, or transcripts, it is convenient and to some extent even literally accurate to approach law as a "conversation," "dialogue," or "talk" of one sort or another. If law

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Reasoning: A Critique of Legal Education, 26 U. MICH. J.L. REF. 69, 122 n.222 (1992) (citing a radio program).

[464] For instance, a search in the LEXIS/NEXIS database yielded 23 articles using the contraction "couldn't" that appeared in the *Stanford Law Review* between 1988 and 1992, as compared with only 8 articles using the same contraction between 1983 and 1987. Similar searches over the same periods for the *Harvard Law Review*, the *Yale Law Journal*, the *Michigan Law Review*, and the *Virginia Law Review* yielded figures of 9 versus 5, 22 versus 16, 24 versus 13, and 10 versus 2, respectively. Search of LEXIS, Lawrev library, Allrev file (Jan. 15, 1994).

[465] *See, e.g.*, Peter Lushing, *Capital Punishment: A Disputation*, 42 ARK. L. REV. 105 (1989); Scott Burris, Note, *Death and a Rational Justice: A Conversation on the Jurisprudence of John Paul Stevens*, 96 YALE L.J. 521 (1987); and the many other examples cited *infra* notes 556, 557, 611.

[466] *See, e.g.*, *Appendix—Transcript of Proceedings*, 15 NOVA L. REV. 795 (1991); *Church/State Symposium—Questions and Answers*, 22 CUMB. L. REV. 663 (1991-92); Discussion, 45 STAN. L. REV. 1577 (1993); Stanley Ingber, *The Demise of Dialogue: Commentary on Perry and Nagel*, 55 ALB. L. REV. 583 (1992); Seminar, *Leveraged Buyouts and Lenders' Risks*, 21 SETON HALL L. REV. 918 (1991); Symposium, *Defining the Corporate Constituency: Panel Discussion*, 59 U. CIN. L. REV. 467 (1990). The presence of such features in a variety of reputable law reviews counters the notion that they might be the last refuge for editors of marginal law reviews lacking quality "orthodox" submissions.

[467] *E.g.*, Jean Stefanic, *The Law Review Symposium Issue: Community of Meaning or Re-inscription of Hierarchy?*, 63 U. COLO. L. REV. 651 (1992).

[468] *E.g.*, Erik M. Jensen, *Law Review Correspondence: Better Read than Dead?*, 24 CONN. L. REV. 159 (1991).

[469] For instance, the literal meaning of "symposium" is "a convivial meeting for drinking, conversation, and intellectual entertainment." 17 OXFORD ENGLISH DICTIONARY 464 (2d ed. 1989).

operates within a music-saturated society, it can certainly have "resonance" and aspire to "polyphony." Insofar as American culture as a whole is becoming more aurally oriented, such metaphoric expressions and turns of phrase have an appeal born of the new familiarity and immediacy of aural experience. At the moment, this appeal may be felt more strongly in the legal professoriate than in the more culturally conservative confines of the legal profession or the judiciary, but there is reason to believe that as aurality becomes increasingly prominent and powerful, aural metaphors will eventually be welcomed in those quarters as well.

But what is propelling the new aurality which is already reconfiguring the established pattern of American legal discourse? The history of Western culture over the past 125 years suggests that the recent turn towards the aural is largely a product of new aural technologies. In essence, cultural aurality has tended to become more pronounced as aural technologies have multiplied and spread.[470] At every stage in this process, the existence of these technologies has radically extended the power and range of aurally communicated information. As technologically transmitted and amplified sound has become able to assume more of the cultural burden, culture itself has turned towards sound for inspiration. Being integral aspects of culture, law in general and legal metaphors in particular have begun to change accordingly.[471]

The "first generation" of genuinely aural technologies[472]—the telephone and the phonograph—appeared and spread between roughly 1875 and 1920. Thanks to Alexander Graham Bell's invention, Europe and America became literally "wired for sound"; at the same time, Thomas Edison's brainchild (invented in 1877, but not made commercially viable until the 1890s) brought a recognizable facsimile of music[473] into thousands of homes. Both devices helped to focus and humanize the noise that was already being generated incidentally by modern machinery and other technological novelties.[474]

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[470] "As a wider range of new material reached the public through telephone, radio, film, records, and television, we developed a stronger orientation toward the auditory mode of receiving and processing information." SCHWARTZ, *supra* note 412, at 13.

[471] "As the predominant form of communication shifts . . . legal metaphors . . . change to reflect the changes in communication." Katsh, *supra* note 182, at 406 n.14.

[472] Some scholars have characterized the mid-nineteenth-century telegraph as an aural technology, but that mechanism was at best only incidentally aural. Not only were its audible clicks incomprehensible to anyone untrained in code, but it was used to send messages that generally started out and ended up in writing.

[473] DON GIFFORD, THE FARTHER SHORE: A NATURAL HISTORY OF PERCEPTION, 1798-1984, at 52 (1990).

Slowly, sound began to have a discernable impact on a variety of different disciplines and undertakings. In linguistics, Frederic de Saussure departed from then-conventional academic wisdom to argue that true language was speech, as opposed to some combination of speech and writing.[475] His essays were particularly remarkable for discussing communication as a circuit, a model which indirectly evoked telephonic communication.[476] A variety of European and American poets abandoned the visualist analogy between poetry and painting (*ut pictura poesis*) that had held intellectual sway since the eighteenth century and instead began to explore the inherently aural relationship between poetry and music.[477] In Ireland, W.B. Yeats called for a return to "the living voice" in literature.[478] Influenced perhaps by the various anti-ocular, aurally indulgent musings of the nineteenth-century philosophic iconoclasts Søren Kierkegaard and Friedrich Nietzsche,[479] Henri Bergson and Edward Husserl turned to dynamic aural phenomena such as tone and melody for metaphoric antidotes to the prevailing spatialized and visualized—and hence strangely static—idea of time.[480] Sound even had an impact on the visual arts. In *The Scream* (1893), the French artist Edward Munsch made a revolutionary attempt to incorporate at least the depiction of sound into the silent visuality of the classical canvas.[481] Other artists like the young Pablo Picasso and George Braque gave their works a modicum of "voice" by incorporating letters, words, and even musical notation into their pictures.[482] On the eve of World War I, Italian Futurist painters used several techniques to evoke aural experience in their work.[483] Marcel Duchamp resolved to "[m]ake a painting of *frequency*."[484] The young Wassily Kandinsky openly likened the process of painting to musical composition (he would ultimately call some of his efforts "improvisations").[485] A few artists even ventured into the relatively untested waters of "performance" where sound could be directly manipulated in the context of other media.[486]

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[474] R. MURRAY SCHAFER, *The Industrial Revolution, in* THE TUNING OF THE WORLD 71 (1977).

[475] "The object of study in linguistics is not a combination of the written word and the spoken word. The spoken word alone constitutes the object." *Quoted in* ROBERT HOPPER, TELEPHONE CONVERSATION 37 (1992).

[476] In one drawing, Saussure depicted the spoken voice travelling from the mouth of one party to the ear of another along what looked very much like telephone wires. *Id.* at 36.

[477] Kenneth Douglas, *Masterpieces of the Modern World, in* 2 THE CONTINENTAL EDITION OF WORLD MASTERPIECES 993, 994 (Maynard Mack et al. eds., 3d ed. 1974); Roy Park, *"Ut Pictura Poesis": The Nineteenth-Century Aftermath*, 28 J. AESTHETICS & ART CRITICISM 155 (1961).

[478] W.B. YEATS, *Literature and the Living Voice* [1906], *in* EXPLORATIONS 202 (1962).

[479] On antiocularism and aurality in Kierkegaard's writings, see ELLUL, *supra* note 119, at 37-39. On antiocularism in Nietzsche, see SARAH KOFMAN, NIETZSCHE AND METAPHOR 105 (1993). Jacques Derrida has actually suggested that "[a]ll of Nietzsche's investigations . . . are coiled in the labyrinth of an ear." JACQUES DERRIDA, SPURS: NIETZSCHE'S STYLES 43 (Barbara Harlow trans., Univ. of Chicago Press 1979) (1978).

[480] VICTOR ZUCKERKANDL, SOUND AND SYMBOL: MUSIC AND THE EXTERNAL WORLD 254 (1956). For a brief discussion of "auditory material" in Husserl's *Phenomenology of Internal Time Consciousness*, see IHDE, *supra* note 81, at 57.

[481] "If one thinks about the history of visual art, one realizes that there are almost no representations of sound or music in painting or sculpture. This lack of images of course makes sense because the forms involve mutually exclusive sensory systems: one cannot see

For all of this frenetic activity, however, aurality remained very much avant-garde. Perhaps as a result, it failed at this stage to command much attention in American law. American courts grappled with a few obvious issues stirred up by the new aural technologies (e.g., the admissibility of phonographic evidence),[487] but the leading American legal minds of the period were much more visualist than auralist in orientation. Oliver Wendell Holmes, whose pronounced visuality was discussed earlier in this Article, was notably inclined to actually and metaphorically "stop" legal conversation rather than start or attempt to sustain it.[488] In 1910, a young Roscoe Pound critiqued the "law in books" that historically had

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hearing, or hear seeing." Craig Adcock, *Marcel Duchamp's Gap Music: Operations in the Space Between Art and Noise*, *in* WIRELESS IMAGINATION: SOUND, RADIO, AND THE AVANT-GARDE 105, 128 (Douglas Kahn & Gregory Whitehead eds., 1992) [hereinafter WIRELESS IMAGINATION].

[482] *See generally* JESSICA PRINZ, *The Text in the Eye*, *in* ART DISCOURSE/DISCOURSE IN ART 1 (1992); E.H. Gombrich, *Image and Word in Twentieth Century Art*, 1 WORD & IMAGE 213 (1985).

[483] On the aurality of Futurist painting (from a Futurist perspective), see generally Carlo Carrà, *The Painting of Sounds, Noises and Smells* [1913], *in* FUTURIST MANIFESTOS 111 (Umbro Apollonio ed., 1973). For a more recent academic discussion of the same subject, see Jane Sharp, *Sounds, Noises, and Smells: Sensory Experience in Futurist Art*, *in* THE FUTURIST IMAGINATION 16 (Anne C. Hanson ed., 1983).

[484] MARCEL DUCHAMP, *The 1914 Box*, *in* SALT SELLER: THE WRITINGS OF MARCEL DUCHAMP (MARCHAND DU SEL) 22, 25 (Michel Sanouillet & Elmer Peterson eds., 1973).

[485] *See generally* Jerome Ashmore, *Sound in Kandinsky's Painting*, 35 J. AESTHETICS & ART CRITICISM 329 (1977); H.L.C. Jaffe, *Syntactic Structure in the Visual Arts*, *in* STRUCTURE IN ART AND IN SCIENCE 137 (Gyorgy Kepes ed., 1965).

[486] Rosalee Goldberg, *Performance: A Hidden History*, *in* THE ART OF PERFORMANCE: A CRITICAL ANTHOLOGY 24, 27-29 (Gregory Battcock & Robert Nickas eds., 1984).

[487] *See* 2 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 795, at 103 n.5 (2d ed. 1923) (discussing 1905 and 1906 cases in which phonographic evidence was introduced to establish the nature of noises made by trains going past plaintiffs' properties).

[488] In this respect, Holmes differed from his literary father, who had always sought to encourage and continue dialogue. It might be argued that while the elder Holmes's style reflected a lingering affection for aural experience and exchange which in the early to mid-nineteenth century had not yet passed altogether out of fashion, the younger Holmes's

both reflected and propelled American legal visuality, but his call to consider the inevitably-more-oral "law in action" was at best only indirectly shaped by new aural habits and values.[489]

The years between 1920 and 1950 witnessed the development of a second generation of aural technologies. Radio was born in the early 1920s; by the mid-1930s radios were playing continuously in hundreds of thousands of living rooms, businesses, and barber shops across Europe and America. Music suddenly became omnipresent;[490] not only did radio make music more available, but people who liked what they heard on the air seemed to develop more of an interest in making music themselves.[491] In the late 1920s, recorded speech and music were introduced to the motion picture theater, where the "talkies" gave birth to a whole new cinematic industry.[492]

In this context, sound assumed a higher cultural profile,[493] picking up slack from a visuality that had lost at least some of its luster in the trenches of the First World War.[494] In literature,

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approach was the by-product of a more visualist late-nineteenth-century culture that was notably more impatient with aural transactions and habits. *See* Gibian, *supra* note 183.

[489] Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910).

[490] Frank Biocca, *The Pursuit of Sound: Radio, Perception and Utopia in the Early Twentieth Century*, 10 MEDIA, CULTURE & SOC'Y 61, 62 (1988) [hereinafter Biocca, *Pursuit of Sound*]. In 1928, one commentator observed that

> [f]ormerly the only music a man heard, week-in-week-out, was the church organ on Sunday, or his daughter's practice hour when he got home too early, with maybe a couple of phonograph records thrown in on a Saturday night. Now he hears several hours of assorted music a week.

Frank Biocca, *Media and Perceptual Shifts: Early Radio and the Clash of Musical Cultures*, 24 J. POPULAR CULTURE 1, 8 (1990).

[491] By 1925, just a few years after the beginning of the American "radio craze," the *New York Times* was reporting a surge in musical instrument sales. Trade publications carried headlines like "America Musically Now Comes of Age"; "This is the Golden Age of Music in the United States"; and "Radio is Doing a Good Job in Music." In 1928, *The Musician* observed that "the nation . . . is becoming more and more tone minded." *Quoted in* Biocca, *Pursuit of Sound*, *supra* note 490, at 66.

[492] *See generally* ALEXANDER WALKER, THE SHATTERED SILENTS: HOW THE TALKIES CAME TO STAY (1986). The introduction of the sound track "changed the structure of movies. . . . Narrative became even more important, and character development, difficult in the silent movie, became central." STEVEN LUBAR, INFOCULTURE 205 (1993).

[493] *See generally* Biocca, *Pursuit of Sound*, *supra* note 490.

[494] On the battlefields of France,

> [t]he invisibility of the enemy, and the necessity of hiding in the earth, the layered intricacy of the defense system, the earshattering roar of the barrage, and the fatigue caused by the day and night shifts, combined to shatter those stable structures that can customarily be used to sequentialize experience. Hearing became much more important than vision as an index of what was real and threatening.

ERIC J. LEED, NO MAN'S LAND: COMBAT & IDENTITY IN WORLD WAR I, at 124 (1979). On the postwar European critique of visuality, see generally Martin Jay, *The Disenchant-*

James Joyce enthusiastically embraced puns[495] and onomatopoeia in his novels *Ulysses* (1922) and *Finnegans Wake* (1939),[496] while William Faulkner made aural expression and experience a central theme of *The Sound and the Fury* (1929).[497] Poets such as T.S. Eliot and Ezra Pound evoked musical formats[498] and used language to achieve striking aural, even lyrical effects in their own works.[499] Dylan Thomas and Robert Frost made reputations for themselves as reciters.[500] In the movies, on stage, and perforce on radio, actors and comedians relied less on visual slapstick and more on voice inflection,[501] dialect,[502] and witty repartee.[503] The new Gestalt psychology adopted "melody" as a primary instance of the fundamental indissolubility of experience.[504] In *Being and Time* (1927), the young German philosopher Martin Heidegger found himself drawn to aural metaphors of knowing and belonging.[505] In *I and Thou* (1933), the Jewish theologian Martin Buber stressed the impor-

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ment of the Eye: Surrealism and the Crisis of Ocularcentrism, 7 VISUAL ANTHROPOLOGY REV. 15 (1991).

[495] On the "fundamentally oral" nature of puns, see JOHN FISKE, UNDERSTANDING CULTURE 112 (1989).

[496] For example: "In the beginning is the woid, in the muddle is the sound-dance and thereinafter you're in the unbewised again . . . ." JAMES JOYCE, FINNEGANS WAKE 378.29 (1939).

[497] *See generally* Karl F. Zender, *Faulkner and the Power of Sound*, 99 PUB. MOD. LANGUAGE ASS'N 89 (1984).

[498] Thus, Eliot's *Four Quartets* and Pound's *Cantos*. *See generally* GEORGE STEINER, LANGUAGE AND SILENCE 29 (1967).

[499] On the oral dimension of Pound's writing and work, see generally MAX NÄNNY, EZRA POUND: POETICS FOR AN ELECTRIC AGE (1973).

[500] Donald Hall, *The Poetry Reading: Public Performance/Private Art*, 54 AM. SCHOLAR 63, 64 (1984-85). Frost's own words help to explain his enthusiasm for recitation: "The ear is the only true writer and the only true reader. . . . [S]entence sounds are very definite entities. They're apprehended by the ear. They're gathered by the ear from the vernacular. The most original writer only catches them fresh from talk where they grow spontaneously." *Quoted in* SCHWARTZ, *supra* note 412, at 120.

[501] *E.g.*, W.C. Fields and Mae West.

[502] *E.g.*, Jack Pearl ("Baron Munchausen"), Bert Gordon (the "Mad Russian"), Harry Einstein ("Parkyakarkus"), not to mention the comedic denizens of Fred Allen's *Allen's Alley* radio program.

[503] *E.g.*, Clark Gable, Katharine Hepburn, and Cary Grant. *See generally* ALAN HAVIG, FRED ALLEN'S RADIO COMEDY 5 (1990); WALKER, *supra* note 492, at 198.

[504] On "melody" in the early history of Gestalt, see GEORGE W. HARTMANN, GESTALT PSYCHOLOGY: A SURVEY OF FACTS AND PRINCIPLES 9-12 (1935).

[505] John D. Caputo, *The Thought of Being and the Conversation of Mankind: The Case of Heidegger and Rorty*, *in* HERMENEUTICS AND PRAXIS 248, 255 (Robert Hollinger ed., 1985). In this early work, however, Heidegger was not consistent in his use of aural metaphors, and indeed abandoned them at a critical moment in his analysis.

> Heidegger initiates his departure from tradition by grounding knowledge in the world via attunement, yet at the point where the primordial access to the world which attunement bestows becomes fully fledged, reflexive, and representable knowledge, he shifts his metaphoric base to that of sight. This allows Heideg-

tance of a life based on intersubjective "dialogue" in which "truth" existed not as an absolute command or position but rather as a relation between "speaking" and "listening" partners.[506] The concept of "dialogue" also animated the writing of Russian literary critic Mikhail Bakhtin,[507] who joined it with the notion of "polyphony," a condition in which the voices of author and character freely overlap and speak together without dominating one another.[508] In art, "sound became the primary focus of the Surrealist movement."[509] The Swiss painter Paul Klee—although not a Surrealist himself—created compositions such as *The Twittering Machine* (1922) and *Polyphonic White* (1929) that were directly inspired by aural phenomena.[510] As if to take revenge on the visualist prejudices and practices of the past, painted, sculpted, and even

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> ger to "keep the connection going" with the tradition of philosophy and to enjoy the rights of representation which this tradition bestows.

Frances Dyson, The Silencing of Sound: Metaphysics, Technology, Media 38 (1993) (unpublished Ph.D. dissertation, University of Technology, Sydney) (on file with author); *see also* David M. Levin, *Decline and Fall: Ocularcentrisim in Heidegger's Recording of the History of Metaphysics, in* MODERNITY, *supra* note 75, at 186, 194 (asserting that in spite of his implicit and explicit criticisms of Western vision-based thinking, Heidegger ultimately is "not at all antiocular.").

In 1929, two years after the publication of *Being and Time*, the American philosopher John Dewey launched a more forthright attack on what he called "the spectator theory of knowledge." JOHN DEWEY, *The Quest for Certainty: A Study of the Relation of Knowledge and Action, in* 4 JOHN DEWEY: THE LATER WORKS, 1925-1953, at 1, 19 (Jo Ann Boydston ed., 1984).

[506] On Buber and dialogue generally, see RONALD C. ARNETT, COMMUNICATION AND COMMUNITY: IMPLICATIONS OF MARTIN BUBER'S DIALOGUE (1986); MAURICE S. FRIEDMAN, MARTIN BUBER: THE LIFE OF DIALOGUE (1955). On actual speech as the key to Buber's ideal of dialogic relation, see STEVEN KEPNES, THE TEXT AS THOU: MARTIN BUBER'S DIALOGICAL HERMENEUTICS AND NARRATIVE THEOLOGY 65-67 (1992).

[507] In his classic work, *Problems of Dostoyevsky's Poetics*, Bakhtin wrote: "To be . . . means to communicate dialogically. When dialogue ends, everything ends." *Quoted in* ROBERT STAM, SUBVERSIVE PLEASURES: BAKHTIN, CULTURAL CRITICISM, AND FILM 187 (1989). On Bakhtin and the concept of dialogue in general, see MICHAEL HOLQUIST, DIALOGISM: BAKHTIN AND HIS WORLD (1990).

[508] On the initial revival of the idea of "polyphony" in pre-World War I poetics, reflecting yet again the modern alliance between poetry and music, see STEPHEN KERN, THE CULTURE OF TIME AND SPACE: 1880-1918, at 72 (1983). On the use of "polyphony" by one of Bakhtin's contemporaries, Polish philosopher Roman Ingarden, see CURTIS, *supra* note 78, at vii.

[509] Christopher Schiff, *Banging on the Windowpane: Sound in Early Surrealism, in* WIRELESS IMAGINATION, *supra* note 481, at 139.

[510] Klee once remarked that the task of painting was "not to render the visible, but to make visible" a personal philosophy which directly empowered and legitimized this type of work. *Quoted in* Jaffe, *supra* note 485, at 143.

filmed depictions of isolated, blind, missing, or mutilated eyes increased in number.[511]

While all this was happening, American law slowly became literally and conceptually more attuned to sound and aurality. Radio forced lawyers to reevaluate the legal significance of speech—"radio defamation" became an important issue in the 1930s.[512] A few lawyers like Karl Llewellyn and Gleason Archer used radio to make their political points or to educate the public in law and legal terminology.[513] For a brief period, radio even restored public "voice" to the courts: portions of the Scopes Trial of 1925 were broadcast nationwide,[514] while a variety of tribunals permitted regular local transmission of their judicial proceedings.[515]

The new importance of sound and speech was most prominently echoed in the legal writings of Judge Jerome Frank. Beginning in the early 1930s, Frank vilified the printed, narrowly visualist legacy of Langdell, labelled absurd the notion that law was best learned from texts in a library, and called for a revised form of legal education which would give law students ample opportunity to hear and see the law as it was actually argued.[516] He repeatedly suggested that trial case records should take the form of "talking movies" instead of typed or printed documents so that trial (and, ultimately, appellate) judges interested in reviewing evidence could hear and see witnesses instead of having to depend merely on the transcript of their words.[517] In 1943, Frank wrote an anonymous article in the *Virginia Law Review* in which—consistent with all of this—he asserted the primacy of spoken over written language in a distinctly Saussurian manner: "*language, at its core, is a tongue*. And the tongue . . . is used . . . for speaking. A written language should, therefore, be directly related to the tongue—to speech. . . . *It would seem clear that good writing is speech heightened in tone and polished in form*."[518] Frank praised jurists such as Hugo Black, William Douglas, and Robert Jackson who he claimed "write much as they talk, as their fellow Americans talk. . . . [O]ne feels, in the writings of each of them, the personality of the writer as a presence . . . ."[519] Benjamin Cardozo, on the other hand, attracted Frank's criticism for having made his writing "unspeakable"—excessively literary, overly refined, and artificial.[520]

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[511] *See* Gerald Eager, *The Missing and Mutilated Eye in Contemporary Art*, 20 J. AESTHETICS & ART CRITICISM 49 (1961); Jeanne Siegel, *The Image of the Eye in Surrealist Art and Its Psychoanalytic Sources, Part One: The Mythic Eye*, ARTS MAG., Feb. 1982, at 102.

[512] *See, e.g.*, Donald R. Graham, *Defamation and Radio*, 12 WASH. L. REV. 282 (1937); Lawrence Vold, *The Basis for Liability for Defamation by Radio*, 19 MINN. L. REV. 611 (1935).

[513] In 1927, Karl Llewellyn used radio to plead publicly for a commutation of the death sentences of Sacco and Venzetti. WILLIAM TWINNING, KARL LLEWELLYN AND THE REALIST MOVEMENT 345 (1973). Gleason Archer, the founding Dean of the "evening" Suffolk Law School in Boston, appears to have been the first person regularly to use radio as a tool of public legal education: in 1930 and 1931, he delivered a series of thirty-six talks on law over a network of stations associated with NBC. The talks are collected in GLEASON ARCHER, LAWS THAT SAFEGUARD SOCIETY (1931). Llewellyn, Roscoe Pound, John Wigmore, and Learned Hand later spoke on various subjects in the series *The Lawyer and the Public*, sponsored by the American Bar Association and broadcast on the Columbia network in 1933 and 1934. *A.B.A. Broadcasts*, 9 CAL. ST. B.J. 265 (1934); *The American Bar Association Goes on the Air*, 8 CAL. ST. B.J. 52 (1933).

[514] *See generally* James W. Wesolowski, *Before Canon 35: WGN Broadcasts the Monkey Trial*, 2 JOURNALISM HIST. 76 (1975).

[515] *See* Mitchell Dawson, *Broadcast Trials?—Yes*, THE ROTARIAN, Oct. 1937, at 14; *Radio Out of Police Court*, VARIETY, Dec. 9, 1936, at 38; Judge William H. Schaeffer, *Broadcasting Traffic Trials*, AM. CITY, July 1935, at 77.

[516] *See* Jerome Frank, *What Constitutes a Good Legal Education?*, 19 A.B.A. J. 723 (1933); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); *see also* Jerome Frank, *A Plea for Lawyer Schools*, 56 YALE L.J. 1303 (1947) [hereinafter Frank, *A Plea*].

As might have been expected, music too found a niche in legal discourse at this time. In his 1934 decision in *Helvering v. Gregory*,

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[517] JEROME FRANK, LAW AND THE MODERN MIND 118-19 n.9 (Anchor Books 1963) (1930). In a 1949 essay, Frank raised the option of "talking movies" again after quoting one judge as saying that a

> stenographic transcript . . . fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the mere words signify. The best and most accurate record [of oral testimony] is like a dehydrated peach; it has neither the substance nor the flavor of the peach before it was dried.

JEROME FRANK, *Facts Are Guesses*, *in* COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 14, 23 (1949) [hereinafter COURTS ON TRIAL]; *see also* United States v. Rubenstein, 151 F.2d 915, 921 n.5 (2d Cir. 1945) (Frank, J., dissenting); JEROME FRANK, *The Upper-Court Myth*, *in* COURTS ON TRIAL, *supra*, at 222, 224. In the late 1980s, almost sixty years after Frank first made his proposal, a number of Kentucky courts began treating videotapes as the sole and official form of trial record. Collins & Skover, *supra* note 394, at 538-39.

[518] Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion*, *in* A MAN'S REACH: THE PHILOSOPHY OF JUDGE JEROME FRANK 35, 36-37 (Barbara F. Kristein ed., Greenwood Press 1977) (1965) (article originally published at 20 VA. L. REV. 625 (1943)). In 1947, this oralist philosophy probably played a role in leading Frank to give up the then-standard practice of referring to himself in the third person in his own writings, and to adopt instead the conversational first-person pronoun "I." This, he commented, "abandons the impersonal disguise and frankly reveals the personal character of the statements." Frank, *A Plea*, *supra* note 516, at 1303 n.2.

[519] Anon Y. Mous, *supra* note 518, at 46-47.

[520] *Id.* at 42. In another article, Frank declared that "Cardozo's style is unpleasantly ornate, baroque, needlessly intricate, a barrier at times to understanding his meaning." Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 672 (1957). In this latter piece, Frank praised Learned Hand for the same reasons he had singled out Black, Douglas, and Jackson. He noted that another judge had said of Hand that "he never knew a man whose writings so conveyed the life of his talk." *Id.* at 674.

Judge Learned Hand departed from traditional legal language in suggesting that the meaning of a sentence in a statute was more than just the meaning of its separate words, just "as a melody is more than the notes."[521] Frank later suggested that Hand had been influenced by the musical metaphors of Gestalt.[522] In 1941, when Karl Llewellyn attacked "paper rules," he wrote, in a turn of phrase that now sounds remarkably contemporary, that the "rightist and most beautiful type of legal rule, [is] the singing rule with purpose and with reason clear."[523] Llewellyn at least entertained a broader analogy between law and music, even if he ultimately rejected that for a more classically visualist analogy between law and architecture.[524] A few years later, Frank wrote two articles in the Columbia and Harvard law reviews forcefully espousing the analogy that Llewellyn had cast aside. In *Words and Music: Some Remarks on Statutory Interpretation*, Frank compared judicial interpretation of a statute to a performer's interpretation of a musical composition.[525] Just as a "wise composer" expects a performer to interpret his score with an insight transcending its literal meaning, Frank argued that a wise legislature (and a wise public) should allow a judge to interpret a statute otherwise than according to the technical meaning of its words.[526] In *Say it with Music*, he took the musical analogy even further, suggesting that the comparison of law with music captured the emotional, nonrational aspect of legal decision making (Judge Hutcheson's famous "hunch") that could not be verbally expressed.[527]

Still, aural styles and analogues did not exactly take the American legal community by storm. The Realist predilections of Llewellyn and Frank may ironically have done as much to burden the new ideas as benefit them. When in 1939 British legal theorist Carleton Allen applied the label "jazz jurisprudence" to some of the new legal ideas coming out of the United States it was a mark of disdain, not admiration.[528] The force of tradition was strong: in a society that was still overwhelmingly visual (even if, in an age of cinema and experimental television, it was no longer exclusively textual) law remained very much a visual, writing-based enterprise. In 1937, the American Bar Association even succeeded in turning the clock back by stilling the just-liberated judicial voice, the broadcast example of which might eventually have done much to encourage and sustain the nascent jurisprudential turn towards aurality.[529]

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[521] Helvering v. Gregory, 69 F.2d 809, 811 (2d Cir. 1934).

[522] Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1267 (1947). *See supra* note 504 and accompanying text.

[523] K.N. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 250 (1941-1942); *see also* KARL N. LLEWELLYN, THE COMMON LAW TRADITION 183, 246-47 (1960).

[524] Llewellyn, *supra* note 523, at 230. In this context it may not be irrelevant that Llewellyn frequently regaled gatherings of law teachers with songs on legal subjects, the most famous of which was his ballad *The Common Law Tradition*. This "hobby" suggests that, although Llewellyn was at some level capable of seeing a connection between law and music, he did not believe the two could be seriously compared or combined.

[525] Frank, *supra* note 522.

[526] *Id.* at 1262-64.

[527] Jerome Frank, *Say It with Music*, 61 HARV. L. REV. 921 (1948).

Since 1950, we have seen the spread of a third and perhaps even the birth of a fourth generation of aural technologies. The development of magnetic tape at the end of the Second World War made sound recording—and hence the study and cultural recognition of sound—much easier than it had been before;[530] Phillips Corporation's invention of the audio cassette in 1963 put tape recording and playback capacity in the hands of millions. In the 1950s, television rapidly joined radio in the home—TV was obviously a visual medium (we "watch" TV), but it also had (and has) a significant aural dimension.[531] The 1950s and early 1960s similarly witnessed the development of hi-fi and stereo systems that made domestic sound reproduction notably more realistic and helped to popularize music to an unprecedented extent. Since 1980, audio technology has been radically miniaturized in Walkmans and digitized by computers in ways that have made music and the spoken word the companions of our every waking moment. There are numerous signs that this technology will soon become even more socially significant.[532]

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[528] CARLETON K. ALLEN, LAW IN THE MAKING 45 (3d ed. 1939).

[529] The ABA's instrument for silencing the courts was Canon 35 of the Code of Professional Ethics, which read in part: "Proceedings in court should be conducted with fitting dignity and decorum. The . . . broadcasting of court proceedings degrade[s] the court and create[s] misconceptions with respect thereto in the mind of the public and should not be permitted." *Quoted in* Oscar Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 MINN. L. REV. 453, 465 (1940). For a reprint of the ABA report which led to the adoption of Canon 35, see *id.* at 477-508.

[530] "Before [the recording improvements of the 1940s] there was considerable practical difficulty in studying spoken language . . . . There was therefore an understandable bias towards studying written language . . . ." MICHAEL STUBBS, LANGUAGE AND LITERACY: THE SOCIOLINGUISTICS OF READING AND WRITING 23 (1980).

[531] ROGER SILVERSTONE, THE MESSAGE OF TELEVISION: MYTH AND NARRATIVE IN CONTEMPORARY CULTURE 34-48 (1981). In this connection it is noteworthy that "talk shows" (*Oprah*, *Donahue*, etc.) draw some of the largest TV audiences. *See also* Susan Stamberg, *Visual Era or No, Voices Are Back in the Picture*, N.Y. TIMES, Aug. 26, 1990, at H25 (discussing the importance of voices in TV and movie animation).

[532] As this Article is being written, television advertisements are trumpeting the advantages of electronic voice-recognition technology for computer and telephone users. On

In such circumstances, sound's literary, artistic, and philosophical stock has gone up yet again. The new audio technology has directly and indirectly supported the growing public interest in poetry and storytelling. In the artistic community, sound has actually been made a part of numerous multimedia works[533] and has become especially prominent in contemporary "performance art."[534] Filmmakers and cinema theorists have finally been prompted to take a serious interest in the sound track.[535] Among the growing ranks of Continental and American philosophers who have lately rejected visual metaphors for thinking and knowing,[536] a notable variety have reasserted the value of aurality and aural practices.[537] In *What is Called Thinking?* (1954) the mature Martin Heidegger called hearing "our need and necessity";[538] in *Truth and Method* (1975) Hans-Georg Gadamer declared that "the primacy of hearing is the basis of the hermeneutical phenomenon,"[539] meaning that our growing interest in engaged interpretation rather than analytic

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computer voice-recognition and voice-generation, see S. Joy Mountford & William W. Gaver, *Talking and Listening to Computers*, *in* THE ART OF HUMAN-COMPUTER INTERFACE DESIGN 319 (Brenda Laurel ed., 1990); Nicholas Negroponte, *Talking to Computers: Time for a New Perspective*, WIRED, Feb. 1994, at 134 ("[F]ifteen years from now, the bulk of our interaction with computers will be through the spoken word.").

[533] *See, e.g.*, Lin Emery & Robert Moriss, *Kinesone I: A Kinetic Sound Sculpture*, 19 LEONARDO 207 (1986); Bill Fontana, *The Relocation of Ambient Sound: Urban Sound Sculpture*, 20 LEONARDO 143 (1987).

[534] Goldberg, *supra* note 486, at 26.

[535] *See, e.g.*, MICHEL CHION, AUDIO-VISION: SOUND ON SCREEN (Claudia Gorbman ed. & trans., Columbia Univ. Press 1994) (1990); SOUND THEORY/SOUND PRACTICE (Rick Altman ed., 1992).

[536] *See generally* JAY, *supra* note 85; Caputo, *supra* note 505, at 254-55. Richard Rorty has argued that "[w]e must get the visual, and in particular the mirroring, metaphors out of our speech altogether." RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 371 (1979).

[537] French political economist Jacques Attali has penned what might be described as a provocative "manifesto" for this diverse group: "For twenty-five centuries, Western knowledge has tried to look upon the world. It has failed to understand that the world is not for beholding. It is for hearing. It is not legible, but audible." JACQUES ATTALI, NOISE: THE POLITICAL ECONOMY OF MUSIC 3 (Brian Massumi trans., Univ. of Minn. Press 1985) (1977).

[538] *Quoted in* DAVID M. LEVIN, THE LISTENING SELF: PERSONAL GROWTH, SOCIAL CHANGE AND THE CLOSURE OF METAPHYSICS 17 (1989). On Heidegger's use of aural metaphors in his later work, see also HANNAH ARENDT, THE LIFE OF THE MIND: THINKING 122 (1978).

[539] HANS-GEORG GADAMER, TRUTH AND METHOD 420 (Garett Barden & John Cumming eds., Crossroad Publishing 1975) (1960); *see also* GEORGE H. TAYLOR, TEXTUALISM AT WORK (forthcoming 1995) (manuscript at 215, on file with author) ("[I]t remains one of hermeneutics' major contributions—one all the more powerful in today's world—that it adopts as a fundamental posture that of hearkening, hearing, listening.").

explanation represents the triumph of ear over eye.[540] The idea (or perhaps more accurately, the ideal) of life and thought as "dialogue," "discourse," or "conversation" has simultaneously gained momentum thanks in part to the writings of Gadamer,[541] Jürgen Habermas,[542] Michael Oakeshott,[543] Richard Rorty,[544] and Richard Bernstein.[545] Aurality has even been heralded as a guiding principle of the new postmodernism.[546]

Sound has similarly affected other aspects of contemporary intellectual life and language. In a variety of academic disciplines, growing cultural aurality has had a diffuse, if definite, impact; in several disciplines, professional familiarity with or reliance on particular aural technologies has directly magnified aurality's impact on thought and terminology. For example, rhetoric has been reborn in circumstances where radio and television together have radically increased the social power of aural argument.[547] Within a few short years in the early 1960s, Marshall McLuhan, Walter Ong, and Eric Havelock—all of whom had been influenced by their experiences with radio[548]—introduced the professoriate to the precepts and practices of preliterate or marginally literate "oral cultures." In a technological environment where a researcher can capture speech and song with the flick of a switch, the historical and literary study of "oral traditions" has since become an academic growth industry. As technical advances have made field recordings much easier to make, anthropologists have "coincidentally" begun to reconceptualize their discipline in oral terms. In 1964, Claude Lévi-Strauss chose music as the conceptual theme of his classic work *The Raw and the Cooked*;[549] in the 1980s, "postmodern anthropology" was characterized as a form of dialogic listening rather than observation.[550] Psychologists like Carol Gilligan, Mary Field Belenky, and Lyn Mikel Brown who in the last decade or so have depended on tapings for the preservation and study of subject interviews have proved particularly willing to embrace "voice" and "listening" as figurative expressions of psychological identity and relation.[551] Historians have meanwhile started to take oral history seriously. From the most meager and technologically awkward of beginnings in the late 1940s and early 1950s, that enterprise rapidly gained critical respect as recording methods improved and aurality gained cultural and academic stature through the 1970s and 1980s.[552]

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[540] Following the French philosopher Paul Ricouer, George Taylor has lately suggested that "the hermeneutic posture is to be contrasted with more prevalent models that examine a text on the basis of an analytic grid brought to and imposed upon a text—a differentiation that may crudely be termed one between understanding and explanation." TAYLOR, *supra* note 539 (manuscript at 215 n.335).

[541] *See, e.g.*, GADAMER, *supra* note 539, *passim*. On Gadamer and conversation/dialogue, see Francis J. Ambrosio, *Gadamer, Plato, and the Discipline of Dialogue*, 27 INT'L PHIL. Q. 17 (1987).

[542] *See, e.g.*, JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION (Christian Lenhardt & Shierry W. Nicholsen trans., MIT Press 1990) (1983).

[543] *See, e.g.*, MICHAEL OAKESHOTT, *The Voice of Poetry in the Conversation of Mankind*, *in* RATIONALISM AND POLITICS AND OTHER ESSAYS 197 (1962).

[544] *See, e.g.*, RORTY, *supra* note 536.

[545] *See, e.g.*, RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS (1983).

[546] *See* THOMAS DOCHERTY, AFTER THEORY: POSTMODERNISM/POSTMARXISM 16 (1990) ("*[P]ostmodernism prioritizes the aural*; it . . . works against the specular and even against theory or speculation in order to re-install the lost sense of hearing; it shapes itself around the model of the labyrinthine ear."). Martin Jay has recently suggested a fascinating link between the antispecular (and, in Docherty's terms, pro-aural) aspect of postmodernism and "the intense fascination with Judaism that gripped many French intellectuals in the 1970s and 1980s." JAY, *supra* note 85, at 546.

[547] *See generally* LANHAM, *supra* note 267, at 55-96.

[548] "We had all been listening to the radio, a voice of incessant utterance, orally communicating fact and intention and persuasion, borne on the airwaves to our ears. Here was a new type of demand on our attention, even a new force exercised over our minds." ERIC HAVELOCK, THE MUSE LEARNS TO WRITE: REFLECTIONS ON ORALITY AND LITERACY FROM ANTIQUITY TO THE PRESENT 30 (1986).

It is over this same period that aurality has begun to blossom in American law. In the 1950s and 1960s, a few dialogues began to show up in American law reviews.[553] The dialogues certainly had deep legal roots in the long-standing courtroom practice of cross-examination and in the "Socratic dialogue" of the classroom. Still, they appeared in print (quite unself-consciously) only after technological advances had helped aurality and aural conventions gain greater credence in American culture as a whole. Most of the aural, aurally empowering, aurally evocative, and aurally sensitive features of contemporary American legal life and scholarship that I mentioned at the beginning of this section are nonetheless the products of the last ten to fifteen years. During this time, the lawyers and jurists who grew up in the sound-saturated 1960s and 1970s have come of professional age; not surprisingly, they have brought to their work and their writing the comfortable relationship with aurality that they developed in their youth. Their aural inclinations have only been validated and encouraged by the habits and expectations of newly admitted lawyers and legal scholars of the "Walkman generation."

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[549] CLAUDE LÉVI-STRAUSS, THE RAW AND THE COOKED: INTRODUCTION TO A SCIENCE OF MYTHOLOGY I (1969).

[550]
> Post-modern anthropology is the study of man "talking." . . . Post-modern anthropology replaces the visual metaphor of the world as what we *see* with a verbal metaphor in which world and word are mutually implicated . . . . Post-modern anthropology is thus the end of an illusion. It ends the separation of word and world created by writing . . . .

Stephen A. Tyler, *Post-Modern Anthropology*, *in* DISCOURSE AND THE SOCIAL LIFE OF MEANING 23 (Phyllis P. Chock & June R. Wyman eds., 1986); *see also* DENNIS TEDLOCK, *The Analogical Tradition and the Emergence of a Dialogical Anthropology*, *in* THE SPOKEN WORD AND THE WORK OF INTERPRETATION 321 (1983); James Clifford, *Introduction: Partial Truths*, *in* WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY 1, 9 (James Clifford & George E. Marcus eds., 1986); Steven Webster, *Dialogue and Fiction in Ethnography*, 7 DIALECTICAL ANTHROPOLOGY 91 (1982).

[551] *See, e.g.*, BROWN & GILLIGAN, *supra* note 251, at 26 (emphasizing how "[w]orking with audio-tapes . . . enables us to sound and re-sound, trace and retrace voice(s) through the interview process").

[552] Louis Starr, *Oral History*, *in* ORAL HISTORY: AN INTERDISCIPLINARY ANTHOLOGY 3-21 (David K. Dunaway & Willa K. Baum eds., 1984). In the late 1980s, oral history became the subject of an annual survey in the prestigious *Journal of American History*.

[553] *See, e.g.*, Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954); Glenn W. Ferguson, *Vocabulary, Veil, and Vested Interest: A Dialogue*, 10 J. LEGAL EDUC. 87 (1957); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on the "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962).

One statistically convenient measure of the momentum of the most recent shift towards aurality in contemporary American law is the late increase in the number of dialogues published in American law reviews.[554] Here, the story is not that dialogues are becoming commonplace (far from it), but that their numbers are rising so quickly. A comprehensive manual search of university law reviews published between 1983 and 1992 indicates (taking three-year intervals as benchmarks) that three fictionalized dialogues were published in 1983, five were published in 1986, five appeared in 1989, and seven appeared in 1992.[555] Over the same period, dialogues have moreover changed from being an experimental, even exotic form primarily associated with audacious, albeit less prominent, law reviews[556] into an at least marginally mainstream genre that is increasingly acceptable to the editors of "elite" legal journals.[557]

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[554] Law reviews are not, of course, the only forums in which law professors publish dialogues. *See, e.g.*, BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

[555] The presence of almost all of these dialogues in older primary (as opposed to newer secondary or "spin-off") university law reviews suggests that this phenomenon is not simply the result of the late proliferation of law reviews in general.

[556] *See, e.g.*, Stanley A. Freedman & Ward Smith, *Non-Price Competition by the Monopolist Under Section 2 of the Sherman Act: A Dialogue*, 14 U. TOL. L. REV. 469 (1983); Friedland, *supra* note 440; Andreas F. Lowenfeld & Linda J. Silberman, *Choice of Law and the Supreme Court: A Dialogue Inspired by* Allstate Insurance Co. v. Hague, 14 U.C. DAVIS L. REV. 841 (1981); Norman Redlich, *Hugo Black Enters His Hundredth Year: Some Heavenly Reflections on the Constitution*, 38 ALA. L. REV. 357 (1987); John W. Van Doren & Patrick T. Bergin, *Critical Legal Studies: A Dialogue*, 21 NEW ENG. L. REV. 291 (1985-86).

[557] *See, e.g.*, Burris, *supra* note 465; Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39; Richard Delgado, *Derrick Bell*

The presence of new aurally oriented legal forms is more than matched by the recent growth of aural metaphors in American law and legal scholarship. Leading terms like "dialogue," "voice," and "conversation" seem to have entered American legal discourse in force during the early to mid-1980s,[558] thanks largely to the efforts of Bruce Ackerman,[559] Robert Cover,[560] Robert Burt,[561] James Boyd White,[562] Stephen Burton,[563] Carrie Menkel-Meadow,[564] and Frank Michelman.[565] It is very difficult to determine just how fast these specific aural figures of speech (which have since been joined by others) are gaining ground in the American legal community at large, but it may be significant that the metaphoric use of "dialogue" and "voice" in the titles of articles appearing in American university law reviews has increased markedly in the past decade. A keyword search in the INFOTRAC/LEGALTRAC database yields one such article including the metaphoric term "dialogue" in 1983, three in 1986, three in 1989, and seven in 1992. The metaphoric term "voice" was similarly included in the titles of one law review article published in 1983, three articles published in 1986, six in 1989, and eleven in 1992. The metaphoric term "conversation," although introduced with the others, has only recently come into its own in article titles, with five titles carrying that figure of speech in their titles since 1990.[566]

Another relevant if somewhat more impressionistic measure of the shift towards metaphoric aurality is the late increase of interest in the analogy between law and music. The analogy appears to have re-emerged in 1982 with the publication of a book by Daniel Kurtzer called *The Music of the Laws*. In 1985, a student-written

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and the Ideology of Racial Reform: Will We Ever Be Saved?, 97 YALE L.J. 923 (1988) (reviewing DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987)).

[558] Prior uses of these and other aural metaphorical terms in modern American legal literature are scattered and tend to stand out by virtue of their isolation. *See, e.g.*, ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 111 (1975) (discussing the "endlessly renewed educational conversation" between the public and the Supreme Court on the terms of public obedience to judicial rulings); JAMES B. WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION 215-18 (1973) (describing as "conversation" the ongoing process of statutory interpretation and application).

[559] *See, e.g.*, ACKERMAN, *supra* note 554.

[560] *See, e.g.*, Cover & Aleinikoff, *supra* note 27.

[561] *See, e.g.*, Burt, *supra* note 451.

[562] *See, e.g.*, JAMES B. WHITE, WHEN WORDS LOSE THEIR MEANING (1984).

[563] *See, e.g.*, STEPHEN J. BURTON, INTRODUCTION TO LAW AND LEGAL REASONING (1985).

[564] *See, e.g.*, Menkel-Meadow, *supra* note 387.

[565] *See, e.g.*, Michelman, *supra* note 27.

[566] Searches of INFOTRAC/LEGALTRAC, February 1994.

Note in the *Southern California Law Review* explicitly revived Frank's musical musings of the 1940s.[567] Since that time, a variety of articles have appeared addressing different aspects of the analogy. Some scholars have merely toyed with the metaphor in much the same way as Kurtzer had done, hoping perhaps to humanize law in the process.[568] Others have offered more thoughtful explorations of the similarities between the genres. For instance, Peter Teachout and Robert Abrams have likened legal and musical composition,[569] while John Hart Ely and John Calmore have contemplated the metaphorical links between jazz and constitutional law and critical race theory respectively.[570] Sanford Levinson and J. M. Balkin have explored the connection between the "authentic performance" theory of early music and certain styles of legal interpretation (in particular, constitutional originalism).[571] Jerry Phillips has lately suggested that we approach law as metaphoric "ornamentation," i.e., the spontaneous embellishment of a set musical score.[572] While all this has been happening, metaphoric references to "harmony" and "dissonance" in the titles of university law review articles have increased significantly. An INFOTRAC/LEGALTRAC search reveals six uses of the word "harmony" in university law review titles between 1980 and 1986, and twelve uses between 1987 and 1992.[573] "Dissonance" appeared in the title of one article before 1986, and has been used in three since then.[574] Going even further, the title of one law review article published in 1987 seems figuratively to have recalled the Muse whom Blackstone had dismissed from Anglo-American jurisprudence almost two and a half centuries before.[575] In 1990, a second published paper metaphorically revived the "music of the spheres,"[576] while the title of a third employed the word "polyphony" for the first time.[577] In the wake of all this "sound" scholarship, it would seem that law has, in a sense, become tuneful *nomos* once again.[578]

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[567] Mark Fleischer, Note, *The Interpretive Process and* People v. Marotta*: A Search for Safety in the Shadow Between Concept and Reality*, 58 S. CAL. L. REV. 1051 (1985).

[568] *See, e.g.*, Floyd Abrams, *Content Neutrality: Some Thoughts on Words and Music*, 10 HARV. J.L. & PUB. POL'Y 61 (1987); Dean Robert L. Misner, *Songlines for the Lawyer*, 29 WILLAMETTE L. REV. 1 (1993).

[569] Abrams, *supra* note 20, at 2; Teachout, *supra* note 454.

[570] Calmore, *supra* note 390; John H. Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 837 n.10 (1991) ("On the Constitution as a Lead Sheet").

[571] Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991).

[572] Jerry J. Phillips, *Law as Ornamentation*, 10 THOMAS M. COOLEY L. REV. 499 (1993).

[573] Search of INFOTRAC/LEGALTRAC, February 1994.

[574] For a recent titular use of the related term "resonance," see Durham, *supra* note 23.

[575] Abrams, *supra* note 20 (article entitled *Sing Muse: Legal Scholarship for New Law Teachers*).

B. *Aurality and Diversity*

In addition to being a product of changing cultural conditions, the rising popularity of aural metaphors in American legal literature is also attributable to the new willingness and political ability of a growing number of female, African American, Hispanic, and Jewish legal scholars from historically marginalized and relatively more aural backgrounds to bring those backgrounds more directly to bear on their legal writing and discourse.[579] Much of the work produced by these scholars is overtly based on an aurally indulgent methodology that attempts "to know history from the bottom" by drawing from "sources often ignored," in particular "poems, oral histories, and stories from . . . experiences of life in a hierarchically arranged world."[580]

This novel and self-assured "turn toward experience" may be regarded as the product of four factors operating both inside and outside contemporary American law schools. First, the feminist movement, the civil rights movement, the Chicano Revival, and the general "diversity" movement have lately helped to legitimate the subject of lives led outside the dubious shelter of the dominant gender, racial, ethnic, and religious umbrellas.[581] As a result, female, African American, Hispanic, and Jewish legal scholars have become more willing to think, teach, and especially write on their own terms,[582] while white, male, Anglo, and Protestant Americans have become more willing to hear their stories. Second, the number of female, African American, and Hispanic scholars in the American legal academy—within which most legal scholarship is done—has risen dramatically in recent years, thanks to largely less-restrictive law school admission and hiring policies. For instance, in 1970 sixty-six tenure-track women constituted 2.2% of the American legal professoriate;[583] by 1990, women made up 24% of the full-time faculty at AALS-accredited law schools.[584] The gains for African Americans and Hispanics have not been as great, but have still been striking.[585] In a less thoroughly alien professional environment, female, African American, and Hispanic law professors have inevitably felt more secure in plumbing the depths and affirming the power of their own traditions and practices.[586] Third, African American, Hispanic, and Jewish legal scholars have lately found themselves working in law schools where once-predominant faiths in the individual, in objectivity, and in traditional forms of dispute resolution are being doubted and challenged by growing numbers of "majority" scholars. Insofar as the historical values and experiences of out-groups seem to provide, almost by defini-

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[576] Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89 (1990).

[577] Weisbrod, *supra* note 29 (article entitled *Practical Polyphony: Theories of the State and Feminist Jurisprudence*).

[578] *See supra* note 94 and accompanying text.

[579] Again, reference to legal scholars from these particular groups is not meant to be definitive. The same point could be made about a growing number of (as yet comparatively few) Native American and Asian American legal writers. The reader who is interested in manifestations of aurality in Asian American legal scholarship should see Robert S. Chang, *Toward an Asian-American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993); Carolyn Jin-Myung Oh, *Questioning the Cultural and Gender-Based Assumptions of the Adversary System: Voices of Asian American Law Students*, 7 BERKELEY WOMEN'S L.J. 125 (1992). Chang's article (notably the first to call for an "Asian American Legal Scholarship") is remarkable not just for its repeated use of aural metaphors, but for its metaphorically musical structure, featuring both a "Prelude" and a "Coda."

[580] Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2324 (1989).

[581] As a general matter, one wonders to what extent the causes of traditionally marginalized, relatively more aural American groups have been assisted by the development of the

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new cultural aurality and the new aural technologies discussed in the preceding section of this Article. For instance, to what extent have the new technologies encouraged feminism and civil rights by making it literally easier for American women and African Americans to make their voices heard (here consider the fundamental effect of broadcast speeches and demonstrations on the fortunes of both movements)? Analogously, to what extent has the new cultural aurality encouraged American men and whites to take those voices more seriously than they took them before?

[582] For the powerful and moving story of how considerations of diversity and community have lately prompted one Jewish American legal scholar to bring more of his faith to his teaching, see Bruce Levine, *An Issue of Professional Identity*, 32 WASHBURN L.J. 35 (1992).

[583] Angel, *supra* note 337, at 802. Compare this to the 1950 figures discussed *supra* in the text accompanying note 337.

[584] CYNTHIA F. EPSTEIN, WOMEN IN LAW 434 (2d ed. 1993).

[585] In 1980 to 1981, there were 123 African American law professors in "majority-operated" law schools; by 1986, there were 187 (constituting 3.7% of the total). Allen J. Webster, Jr., *The Need for More African American Law Professors*, NAT'L B.A. MAG., July-Aug. 1993, at 1. Over the same period, the number of Hispanic law faculty members increased from 24 to 33. Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 556 (1988). By 1991 to 1992, the sum of Hispanic law faculty members had risen to 81. Rex Bossert, *The Hiring of Hispanic Faculty Is Up 25 Percent*, L.A. DAILY J., Jan. 10, 1992, at 1.

[586] *See* Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 691 (1992).

tion, obvious alternatives to beleaguered dominant models,[587] scholars from these backgrounds are increasingly inclined—and in fact are being implicitly and sometimes explicitly encouraged by their majority colleagues—to bring those values and experiences into their legal writing.[588] Fourth and finally, American legal academics of all stripes have been taking more interest in the relationship between law and religion. In this context, Jewish legal scholars have had an additional reason to write from their unique perspective,[589] while it has become easier for Hispanic scholars to draw directly and indirectly on the Catholic aspects of their own cultural tradition.[590]

As more female, African American, Hispanic, and Jewish American law professors have taken up the challenge of bringing more of themselves to their legal scholarship, a good number have drawn on—and have directly or indirectly encouraged others to draw on—the aurality which has traditionally animated and structured so many of their group experiences. Thus, Regina Austin writes of the task before the minority female legal scholar: "The voice . . . reflected in her work should contain something of the essence of the culture that she has lived and learned; imagine, if you will, writing a law review article embodying the spontaneity of jazz, the earthiness of blues, or the vibrancy of salsa."[591] So-called "outsider"[592] scholars have actually been able to follow this sort of advice despite having themselves become thoroughly grounded in visualist, writing-based legal discourse. Many have drawn on a personal "double consciousness"[593] that has allowed them to strive and succeed within the more visualist environment of the dominant culture while maintaining connection with their relatively more aural traditions and values.[594] African American legal scholar Odeana Neal, for instance, has declared that for all her achievements and obvious ability as a highly visualist, highly literate "double Harvard" (Harvard College and Harvard Law) she still "cannot believe in the privilege of the written word . . . for what would that say about the relative importance of things that I hold dearest in my heart, things that were taught to me by unlettered men and women, or whispered by a lover, or giggled about on the phone with a friend?"[595] Another African American law professor, Angela Harris, has chosen to manage her own cultural duality by approaching the written word as, at least metaphorically, a creature of speech and sound. She has pointedly called writing

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[587] Thus, Jewish law has been described as a "contrast case": antihierarchical, egalitarian, communitarian, based on mutual obligations instead of rights, etc. *See* Suzanne L. Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 818-19 (1993); *see also* Steven F. Friedell, *The "Different Voice" in Jewish Law: Some Parallels to a Feminist Jurisprudence*, 67 IND. L.J. 915 (1992).

[588] On the relationship of this majoritarian "loss of confidence" to the new wave of Jewish legal writing in particular, see Stone, *supra* note 587, at 818.

[589] *Id.*

[590] *See, e.g.*, Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990).

[591] Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 543.

[592] Keeping in mind this term's general application to individuals from various "outgroups . . . who have suffered historical under-representation and silencing in the law schools" (Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1, 1 n.2 (1988)), I pointedly extend it in this Article to include Jewish American legal scholars as well as the female, African American, and Hispanic legal scholars to whom it is typically applied.

[593] This term was coined by W.E.B. Du Bois who, ironically perhaps, expressed it via visual metaphors:

> the game of inventing selves, speaking in tongues . . . . Like a ventriloquist, I can write like a woman, like a man, like an intellectual, like a lawyer, like an illiterate. I try on voices as I try on selves . . . . It's like talking on the radio, whispering words into a microphone in a booth to be listened to in a hundred different private rooms. Read my words and try to guess the timbre of my voice . . . .[596]

Legal scholars sharing such ambivalence about writing and (by implication) visuality have used several strategies to reintroduce a measure of aurality to American legal thought. A relatively high number of female, African American, and Hispanic law professors have become very concerned with actual speech. They have raised

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> the Negro is a sort of a seventh son, born with a veil, and gifted with second-sight in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

W.E.B. Du Bois, *The Souls of Black Folk* [1903], *in* Writings 357, 364-65 (Nathan Huggins ed., 1986).

[594] Some scholars have notably described this "double consciousness" as being, in a metaphorical sense, "bilingual." For a brief discussion of this overall phenomenon, see Bender, *supra* note 348, at 18.

[595] Neal, *supra* note 439, at 133. *Compare supra* note 284 (on the privileging of aural over visual experience in African American culture).

[596] Angela Harris, *Women of Color in Legal Education: Representing* La Mestiza, 6 Berkeley Women's L.J. 107, 110-11 (1990-91).

issues related to hurtful speech events,[597] opportunities for speech in the classroom[598] and in and out of court,[599] the status of speech as both a subject of legal scrutiny[600] and a medium for the intellectual evaluation of law students[601] and professors,[602] and the legal ramifications of the very sound of speech.[603] These interests are eminently sensible for scholars who are not only rightly concerned about participation and prejudice, but who come from traditions in which individuals have been markedly empowered by speech and disempowered by silence, and in which the spoken word itself has carried greater weight (both for good and ill) than has usually been attributed to it in the more visualist environment of American culture considered as a whole.[604] A disproportionate number of female, African American, Hispanic, and Jewish law professors have analogously shown an interest in styles of legal scholarship that directly or indirectly evoke aural experience. Many have opted for a more informal, conversational delivery featuring the use of first person pronouns.[605] A wide variety have quoted others' poems,[606] parables,[607] and even songs[608] in legal text or footnotes. In a few instances, outsider scholars have chosen to be still more ambitious,

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[597] *See, e.g.*, Delgado, *supra* note 447; Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Matsuda, *supra* note 580.

[598] *See, e.g.*, Patricia A. Cain, *Teaching Feminist Legal Theory at Texas: Listening to Differences and Exploring Connections*, 38 J. LEGAL EDUC. 165 (1988); Carrie Menkel-Meadow, *Women as Law Teachers: Towards the "Feminization" of Legal Education*, *in* HUMANISTIC EDUCATION IN LAW: MONOGRAPH III 16, 21-22 (1981); Tidwell & Linzer, *supra* note 22, at 813-14 (1991); Stephanie M. Wildman, *The Classroom Climate: Encouraging Student Involvement*, 4 BERKELEY WOMEN'S L.J. 326 (1989-90); Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147 (1988).

[599] *See, e.g.*, Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); Eve Hill, *Alternative Dispute Resolution in a Feminist Voice*, 5 OHIO ST. J. ON DISP. RESOL. 337 (1990); Merry, *supra* note 444; Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 LAW & INEQ. J. 21 (1984); White, *supra* note 230.

[600]
> Where our tradition is oral, anticipating that the story will change with every new teller and listener, the law gives primacy to the words within the four corners of the contract or evidentiary record, making time stand still and silencing the storyteller who comes with news of events or understandings that preceded or followed the written word.

Lawrence, *supra* note 390, at 2279.

[601] *See, e.g.*, Alice K. Dueker, *Diversity and Learning: Imagining a Pedagogy of Difference*, 19 N.Y.U. REV. L. & SOC. CHANGE 101, 110 (1991-1992) ("Although the success of many practicing lawyers will be based more on oral than written presentations . . . , little or no credit is given for such skills.").

[602]
> One of the most difficult presumptions I must strive to overcome . . . is one of the primary presumptions of legal academia: that writing is the most significant act that someone in the profession can undertake, that those who write, and are published, are somehow smarter than those who primarily want to engage in the verbal exchange of ideas, or teaching.

Neal, *supra* note 439, at 132.

[603] *See e.g.*, Matsuda, *supra* note 416; Matthews, *supra* note 445; Mullin, *supra* note 445; Beatrice B. Nguyen, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Non-native Speakers*, 81 CAL. L. REV. 1325 (1993); *see also* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993).

[604] The authority and danger attributed to the spoken word tends to be greatest in completely oral cultures, and least in highly visualist communities: "in an oral culture, which knows words only in their natural habitat, that is, the world of sound, words necessarily

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carry with them a special sense of power. For sound [unlike sight] always indicates the present use of power." Walter J. Ong, *Foreword* to PEDRO L. ENTRALGO, THE THERAPY OF THE WORD IN CLASSICAL ANTIQUITY at xiii (L.J. Rather & John M. Sharp eds. & trans., Yale Univ. Press 1970) (1958).

[605] Among feminist scholars, see, for example, Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Minow, *supra* note 20; Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990); Scales, *supra* note 387. On the psychological and evocatively aural impact of the first person, see Scheppele, *supra* note 462, at 2074 ("Articles [that] break taboos [and] . . . speak with the power of 'I' . . . engage you in a conversation with this named author, this real person, whose struggles and thoughts are revealed in the words on the page."). As late as the mid-1980s, however, adoption of this strategy invited rejection of submissions made even to women's law reviews. *See, e.g.*, Heather R. Wishik, *Reverie*, 16 N.M. L. REV. 495, 500 (1986) (referring to a first-person article eventually published in the *Berkeley Women's Law Journal*).

[606] For instances of poems quoted in recent feminist legal writing, see Dalton, *supra* note 605, at 1010 n.24; Hartigan, *supra* note 458, at 109, 110; Matsuda, *supra* note 244, at 622, 623; Minow, *supra* note 20, at 1908 n.198, 1911, 1913 n.218; Celina Romany, *Ain't I a Feminist?*, 4 YALE J.L. & FEMINISM 23, 31 (1991); Scales, *supra* note 387, at 1384; Judy Scales-Trent, *Using Literature in Law School: The Importance of Telling and Reading Stories*, 7 BERKELEY WOMEN'S L.J. 90, 90, 96-97 (1992).

For instances of poems quoted in African American and Hispanic legal writing, see DERRICK BELL, FACES AT THE BOTTOM OF THE WELL 15 (1992); Calmore, *supra* note 390, at 2156; Kate N. Day, *Lost Innocence and the Moral Foundation of Law*, 1 AM. U. J. GENDER & L. 165, 182-83 (1993); Leslie G. Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878, 1886 n.39 (1990); Linda S. Greene, *Tokens, Role Models, and Pedagogical Politics: Lamentations of an African American Female Law Professor*, 6 BERKELEY WOMEN'S L.J. 81, 87-88 (1990-91); Harris, *supra* note 596, at 111-12; Hobbs, *supra* note 460, at 511; Neal, *supra* note 439, at 133 n.11; Adrien K. Wing, *Brief Reflections Toward a Multiplicative Theory and Praxis of Being*, 6 BERKELEY WOMEN'S L.J. 181, 181 (1990-1991).

[607] For instances of parables quoted in Jewish American legal scholarship in particular, see Burt, *supra* note 451, at 467, 470; Laurence H. Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155, 157 (1984); Steven L. Winter, *The Cognitive Dimension of the* Agon *Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2226 (1989) [hereinafter Winter, *Cognitive Dimension*]; Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1115-16 (1989).

[608] For instances of songs quoted in feminist legal writing, see Austin, *supra* note 591, at 576-77; Finley, *supra* note 21, at 900; Caroline Forell, *Stopping the Violence: Mandatory Arrest and Police Tort Liability for Failure to Assist Battered Women*, 6 BERKELEY WOMEN'S L.J. 215, 215 (1990-1991); Emily F. Hartigan, *Derridoz Law Written in Our Heart/Land: "The Powers Retained by the People,"* 67 TUL. L. REV. 1133, 1195 (1993); Jennifer Jaff, *Against the Flow*, 6 WIS. WOMEN'S L.J. 119, 134 (1991); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 398 (1987); Scales, *supra* note 465, at 9 n.26; Maureen A. Sweeney, *Between Sorrow and Happy*

presenting significant portions[609] and sometimes the entirety of their writings in self-constructed story,[610] dialogue,[611] drama,[612] parable,[613] and poetry.[614] In these forms, these scholars seem to be directly speaking to, instead of writing for, the reader.

Endings: A New Paradigm of Adoption, 2 YALE J.L. & FEMINISM 329, 329 (1990); Brenda Waugh, *A Theory of Employment Discrimination*, 40 J. LEGAL EDUC. 113, 129 n.26 (1990).

For instances of songs quoted in African American or Hispanic legal writing, see DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 54-56, 258 (1987); BELL, *supra* note 606, at 31, 178; Austin, *supra* note 591, at 576-77; Derrick Bell, *The Last Black Hero: A Chronicle of Interracial Love and Sacrifice*, 8 HARV. BLACKLETTER J. 275, 289 (1991); Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357, 1366 (1992); Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 9 (1989).

[609] For a lament on the frequent segregation of these portions from the rest of the "traditional" scholarly text, see Robin West, *Love, Rage and Legal Theory*, 1 YALE J.L. & FEMINISM 101 (1989).

[610] On the disproportionate importance of stories in outsider legal scholarship generally, see Delgado, *supra* note 25; Scheppele, *supra* note 462. For examples of legal storytelling by feminists, see Abrams, *supra* note 449, at 973; Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Matsuda, *supra* note 416, at 1333; Carol Weisbrod, *Divorce Stories: Readings, Comments and Questions on Law and Narrative*, 1991 B.Y.U. L. REV. 143.

For examples of African American legal storytelling, see BELL, *supra* note 606; Taunya L. Banks, *Two Life Stories: Reflections of One Black Woman Law Professor*, 6 BERKELEY WOMEN'S L.J. 46 (1990-91); Greene, *supra* note 606; Lawrence, *supra* note 41.

For examples of Hispanic legal storytelling, see Delgado, *supra* note 608; Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984); Olivas, *supra* note 590; Juan Martinez, Book Review, 9 HARV. BLACKLETTER J. 163 (1992) (reviewing PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991)).

[611] For examples of "outsider" dialogue, see Culp, *supra* note 557; Delgado, *supra* note 557; Delgado *supra* note 25; Richard Delgado & Helen Leskovac, *The Politics of Workplace Reforms: Recent Works on Parental Leave and a Father-Daughter Dialogue*, 40 RUTGERS L. REV. 1031 (1988); Dinesh Khosla & Patricia Williams, *Economies of Mind: A Collaborative Reflection*, 10 NOVA L.J. 619 (1986). The various "chronicles" of Derrick Bell and Richard Delgado are too elaborate to be placed in this category; somewhat arbitrarily, I prefer to treat them as stories.

[612] *E.g.*, Victor Bolden, *Judge Not, That Ye May Not Be Judged: A Dramatic Call for a More Enlightened Approach to Judicial Decision-Making in Race Discrimination Cases*, 7 HARV. BLACKLETTER J. 33 (1990).

[613] For examples of outsider parable, see PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); David Hall, *The Constitution and Race: A Critical Perspective Epilogue*, 5 N.Y.L. SCH. J. HUM. RTS. 425 (1988); Hartigan, *supra* note 458; Martha Minow, *Some Realism About Realism: A Parable for the Fiftieth Anniversary of the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2249 (1989).

[614] For examples of outsider poetry, see Mary E. Griffith, *Sexism, Language, and the Law*, 91 W. VA. L. REV. 125, 149-51 (1988); Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 305 (1989-90); Waugh, *supra* note 608, at 113; Heather Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN'S L.J. 64, 71 (1985); Wishik, *supra* note 605, at 495. The popularity of original poetry among feminist legal scholars is such that a number of the leading women's law journals now devote special attention to that form. *See, e.g.*, 16

Outsider scholars have themselves recognized that their aurally evocative styles and strategies derive a critical measure (although certainly not all) of their power from their ability to recollect, and in that process validate, an actual aurality central to outsider identities and traditions. For instance, Richard Delgado has noted the link between feminist legal narrative and women's consciousness-raising which, he notes, "consists, in part, of the [oral] sharing of stories, of tales from personal experience."[615] Derrick Bell has expressly related the format of his chronicles to African oral storytelling customs;[616] in *And We Are Not Saved*, he moreover associated the antiphonal singing of his Celestial Curia with the aural patterns of "call-response" preaching that he had encountered "in black churches when I was a child."[617] Delgado has analogously connected Hispanic legal stories, chronicles, and dialogues to "Mexican-American . . . corridos (ballads) and stories, passed on from generation to generation."[618] Michael Olivas has made the same connection, and has also tied his own enthusiasm for stories to his Catholic upbringing and his period of training in a Catholic seminary.[619] Robert Cover, the late Jewish American legal scholar who did so much to encourage legal academics to take narrative seriously, overtly acknowledged ancient Hebrew civiliza-

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HARV. WOMEN'S L.J. 275-78 (1993); 1 HASTINGS WOMEN'S L.J. 6, 152 (1989); 2 TEX. J. WOMEN & LAW 145-49 (1993).

[615] Delgado, *supra* note 25, at 2436. More generally, see Humez, *supra* note 246, at 126-27 ("[A]ny distinctively female use of literary forms or style is very likely to reflect women's longer and fuller immersion in the world of the spoken word, as well as gender-specific spoken-arts traditions developed in relation to family, social, and work roles.").

[616] "The use of stories to make a point is, of course, a well-known African tradition . . . ." Derrick Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382, 2394 (1989). *See also* Lawrence, *supra* note 390, at 2278; Neal, *supra* note 439, at 134 ("I suspect that some of the storytelling in the new written scholarship produced by people of color is an attempt . . . to bridge a gap between oral traditions and written traditions.").

[617] BELL, *supra* note 608, at 55. Somewhat more generally, it has lately been argued that

> Bell's use of shifting perspective and self as a subject of interrogation [in *Faces at the Bottom of the Well: The Permanence of Racism*] evokes the blues form which deploys the highly individual voice of the artist, as commentator and participant in shared history and present condition, to connect with, mirror, affirm, and transform the collective as an act of both individual and community self-definition.

Cheryl I. Harris, Book Note, *Bell's Blues*, 60 U. CHI. L. REV. 783, 786 (1993) (reviewing DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992)).

[618] Delgado, *supra* note 25, at 2436; *see also* Olivas, *supra* note 590, at 440.

[619] Olivas, *supra* note 590, at 425, 427.

tion's "magnificent use of [that form] to explore great normative questions."[620]

In the process of taking a professional interest in their own experiences and actually using aural forms as models for their legal scholarship, a disproportionate number of scholars from "nontraditional" backgrounds have embraced aural legal metaphors. Outsider legal writing has indeed become so infused with aural figures of speech that Richard Delgado has appropriately (if somewhat serendipitously) labelled it "voice" scholarship.[621] For instance, feminist legal scholars have repeatedly used aural metaphors to describe legal phenomena and processes.[622] In 1985, Carrie Menkel-Meadow (consciously following feminist psychologist Carol Gilligan) considered "the different voices of lawyering" and proposed a reconception of legal advocacy as "conversation."[623] In the same vein, Clare Dalton suggested that law was a matter of "storytelling."[624] In 1986, Elizabeth Schneider posited "conversation" as metaphor for "rights," while Teresa Godwin Phelps offered the same metaphor as a reconceptualization of legal writing.[625] In the hands of Catherine MacKinnon,[626] Martha Minow,[627] Mari Matsuda,[628] Mary Ann Glendon,[629] Ruth Colker,[630] Carol Rose,[631] and others,[632] aurally evocative metaphors like "dialogue," "voice," "conversation," "storytelling," "listening," and "silencing" have since become a prominent feature of much of the best and best-known feminist legal scholarship. A few feminist law professors have even ventured into the metaphorical terrain of music. Martha

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[620] Cover, *supra* note 449, at 6 n.9.

[621] Delgado, *supra* note 19, at 109.

[622] I am certainly not the first to notice this. *See, e.g.*, Eloise A. Buker, *'Lady' Justice: Power and Image in Feminist Jurisprudence*, 15 VT. L. REV. 69 (1990) (briefly discussing the prevalence of the metaphors of "voice" and "silence" in feminist jurisprudence).

[623] Menkel-Meadow, *supra* note 387, at 49.

[624] Dalton, *supra* note 605.

[625] Phelps, *supra* note 28, at 1102; Schneider, *supra* note 28, at 622.

[626] *See, e.g.*, CATHERINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE (1989).

[627] *See, e.g.*, Minow, *supra* note 20.

[628] *See, e.g.*, Matsuda, *supra* notes 244 & 608.

[629] *See, e.g.*, MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987). For a discussion of Glendon's metaphorical use of "storytelling" and "conversation" in this book, see Katharine T. Bartlett, *Storytelling*, 1987 DUKE L.J. 760 (book review).

[630] *See, e.g.*, RUTH COLKER, ABORTION AND DIALOGUE (1992); Ruth Colker, *Feminist Litigation: An Oxymoron?—A Study of the Briefs Filed in* William L. Webster v. Reproductive Health Services, 13 HARV. WOMEN'S L.J. 137 (1990).

[631] *See, e.g.*, Rose, *supra* note 449.

[632] *See, e.g.*, Alison G. Anderson, *Lawyering in the Classroom: An Address to First Year Students*, 10 NOVA L.J. 271 (1986); Hodges, *supra* note 29; Ramsey, *supra* note 19.

Minow has noted that "[l]egal language, like a song, can be hummed by someone who did not write it and changed by those for whom it was not intended."[633] In her essay *Practical Polyphony*, Carol Weisbrod has suggested that "[t]eaching us to hear the different lines and different narratives is a major emphasis and contribution of feminist jurisprudence. Perhaps it is too soon to judge the issue of ultimate harmony. The first task is to learn to hear the different parts."[634] Emily Fowler Hartigan has been still more metaphorically ambitious. In a remarkable 1988 article, she wrote:

> If law is anything today, it is dispirited . . . . Neither law nor its practitioners *sing*—or even *hum* . . . . [T]his article is intended as one more *song* of change. The words of the *chorus* to the *song* of change are familiar yet demanding . . . .
>
> The reader may not agree with the *voice* identified in the *chorus* about the law of the land; I claim only to remind the reader of the *voice*, and to let the *song sing* in the reader's mind . . . . It is the law of the land *singing* in her people . . . . Its colonial *singers* did not live the full extent of its truth . . . but it is still a *song* of promising integrity. It contains the seeds of reconciliation with the *song* as it will *sing* today.[635]

A significant number of prominent African American and Hispanic law professors have also added aural metaphors to their visualist legal vocabulary. For instance, Jerome Culp, whose work is notably aimed at defining a "black legal scholarship," has employed multiple aural metaphors to capture the misunderstanding that exists between black and white scholars in the contemporary American legal community:

> [B]lack scholars have given *voice* to the interests of people who were always at the margin of the central legal *discourse* . . . . Can we make white scholars *hear* the stories that black scholars are *telling*? My answer to this question is a definite "maybe." White scholars may *listen* to what scholars of color are *saying*, but what they *hear* is not always what scholars of color *speak*.[636]

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[633] Minow, *supra* note 20, at 1912.

[634] Weisbrod, *supra* note 29, at 1018.

[635] Emily F. Hartigan, *Law and Mystery: Calling the Letter to Life Through the Spirit of the Law of State Constitutions*, 6 J.L. & RELIGION 225, 225-26, 237-38 (1988) (emphasis added).

[636] Jerome M. Culp, Jr., *You Can Take Them to Water but You Can't Make Them Drink: Black Legal Scholarship and White Legal Scholars*, 1992 U. ILL. L. REV. 1021, 1021 (emphasis added).

Culp has also used strikingly aural figures of speech for political sensitivity ("my story is easier on the ears of white scholars"),[637] attraction (a colleague's book has "a powerful call on the ears of the majority professorate"),[638] conflicts between alternative schools of jurisprudence (a "cacophony of approaches"),[639] and even Patricia Williams' perception of truth ("[h]er ears hear a different decibel level").[640] In poetic phraseologies rich in metaphoric appeals to all the senses, Williams herself has told how her experience at Harvard Law School "muted my voice to inaudibility," has emphasized the importance of "listening" to the "voices of others" (sometimes "voices lost in the chasm"), and has explored the "dissonance" between blacks and adherents of Critical Legal Studies ("CLS") debating the subject of rights.[641] Kate Nace Day has used the familiar "voice" metaphor to describe her legal education: "Years ago, when I began a study of racism and constitutional law, I listened to voices . . . ."[642] Lani Guinier has described cordial race relations as a conversation "in which everyone declares a willingness to listen respectfully to what other people are saying."[643] John Calmore has used jazz saxophonist Archie Shepp's "fire music" as a metaphor to describe the "oppositional cultural practice" of critical race theory.[644] Richard Delgado has meanwhile adopted a wide variety of aural or aurally related terms in discussing the making and understanding of law. Even his more traditional (i.e., nondialogic) articles contain numerous aural-metaphorical references to "talk," "speaking," "listening," and "audience."[645] His pieces on

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[637] *Id.* at 1026; *see also* Jerome M. Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095, 1100 (1991).

[638] Culp, *supra* note 636, at 1028.

[639] Jerome M. Culp, Jr., *Firing Legal Canons and Shooting Blanks: Finding a Neutral Way in the Law*, 10 ST. LOUIS U. PUB. L. REV. 185, 187 (1991).

[640] Culp, *supra* note 636, at 1033.

[641] WILLIAMS, *supra* note 613, at 55, 150, 154, 201.

[642] Day, *supra* note 606, at 175.

[643] *Quoted in* Dale Russakoff, *Lani Guinier Is Still Alive and Talking*, WASH. POST, Dec. 12, 1993, Magazine, at 14, 19 (identifying the "metaphor of conversation" as central to Guinier's thought and legal language).

[644] Calmore, *supra* note 390, at 2134. For another, albeit less-extended, instance of music-as-metaphor in recent African American legal scholarship, see Beverly M.M. Charles, *"The Lord Don't Like No Ugly."—Racism in America*, 10 NAT'L BLACK L.J. 333, 346 (1988) (reviewing DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987)) ("Bell's characters sing a song which harmonizes with the melodies deep within the breasts of the descendents of slaves in this country. . . . Black people hear the refrains; we hear Jeremiah's lament that we are not saved . . . .").

[645] *See, e.g.*, Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 937, 942, 953, 957, 959-62 (1991).

"outsider scholarship" virtually overflow with identifications of empowerment and perspective with "hearing" and "voice."[646]

Finally, a significant number of law professors openly drawing on their Jewish backgrounds have recently demonstrated an enthusiasm for aurally related legal terminology. Robert Cover, who has been identified as the prime mover in the reintroduction of Jewish values to contemporary American legal discourse,[647] was notably one of the first contemporary legal scholars to regard law as a "narrative,"[648] even a "folktale" (a term more overtly evocative of aural tradition).[649] Indirectly following in the footsteps of Martin Buber (with some of whose philosophic work he was personally familiar),[650] Cover also pioneered the aural-metaphorical notion of law as "dialogue." His "dialectical federalism" presumed a meaningful "dialogue" between the federal and state courts on the matter of rights.[651] Writing of the Jewish legal tradition, he overtly called law a "voice";[652] he described conflict between different jurisprudential schools and authorities as having created a "cacophony" of laws.[653] Cover's work has been complemented by the writing of Robert Burt, who like Cover has emphasized the idea of law as "dialogue"; Burt notably introduced this idea in an article examining the broader relationship between constitutional law and parable.[654] Most recently, George Fletcher, another prominent figure in the developing school of Jewish American jurisprudence,[655] has taken up the metaphor of law as "discourse."[656]

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[646] For instance, in a recent piece, he described the empowerment of minority law professors as "giv[ing] them a voice strong enough that all could hear." Richard Delgado, *The Inward Turn in Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741, 767 (1993).

[647] Steven Winter has for instance acknowledged the "liberating effect" that Cover's work had on him: "For a long time, my traditional education in the extensive Jewish canon was abandoned like a piece of old furniture in a musty attic. Cover's work has shown me how the intellectual abundance of these materials can be a profound source of analytic insight." Winter, *Cognitive Dimension*, *supra* note 607, at 2225 n.3.

[648] Cover, *supra* note 449, at 4.

[649] Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179 (1985).

[650] Minow, *supra* note 20, at 1913 n.219 (referring to one of Buber's books as assigned reading in Cover's Yale seminar on *Myth, Law and History*).

[651] Cover & Aleinikoff, *supra* note 27.

[652] Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 69 (1987).

[653] *Id.* at 68.

[654] Burt, *supra* note 451, at 487-88. On Burt's tendency in this and other works to employ metaphors drawing on Jewish religious practice or experience, see Thomas L. Shaffer, *Judges as Prophets*, 67 TEX. L. REV. 1327, 1338-40 (1989).

[655] Stone, *supra* note 587, at 820 n.30 (discussing the signficance of *S'vara*, Fletcher's journal on Jewish law and philosophy).

[656] Fletcher, *supra* note 24.

Just as some outsider scholars have realized that their aurally evocative legal styles have roots in the actual aural traditions and practices of outsider groups, we should recognize that outsiders' aurally evocative figures of legal speech are at least partly inspired by the same actually aural sources. Like everyone else, legal scholars from relatively more aural backgrounds are undoubtedly drawn to metaphorical terms such as "voice," "dialogue," and "conversation" on general cultural and (as we shall see) phenomenological grounds, but they arguably find those terms additionally attractive because of the relatively more familiar and hence liberating resonances the terms create for them. George Fletcher has lately come to the edge of this realization in observing that "[t]he most magnificent example of law as discourse is the Jewish tradition, beginning with the Bible, blending into the oral law, finding refinement in the Talmud, and continuing to this day . . . as a mode of study in which argument and analysis become religious activities."[657] Analogously, a reader of Lani Guinier's work has speculated that she repeatedly uses the "metaphor of conversation" because "[a]s the daughter of a white [also Jewish] mother and black father who talked frankly to her and to each other about race, this is how she came to understand the subject."[658]

The broad relationship between metaphor and cultural praxis that these commentators are suggesting has implications for other metaphors and other groups. For instance, it is particularly "sensible," empowering, and even defiant (although certainly not necessary, inevitable, or altogether self-indulgent) for feminist legal academics—coming from a formerly marginalized American women's culture that has privileged shared storytelling and aural interaction of all sorts—to promote the idea of law as "dialogue" and to describe injustice as "silencing." It is (similar caveats applying) likewise particularly "sensible," empowering, and defiant for, say, Hispanic legal scholars—coming from an Hispanic culture that in the face of "mainstream" prejudice has prized both its secular oral traditions and its catechistic Catholic heritage—to write in the idioms of "voice" and "story." In this context, appreciating the specific gender, racial, ethnic, and even religious roots of many of the purveyors of the new aural metaphors is a necessary (although certainly not a sufficient) prerequisite to understanding the growing popularity of those metaphors in American legal language.

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[657] *Id.* at 1632. In this context, Robert Cover's aural metaphors for law—"dialogue," "voice," and "cacophony"—become especially appropriate. Behind them one can almost hear the literal voices of generations of rabbis, forever debating one another in synagogue and temple.

[658] Russakoff, *supra* note 643, at 16.

C. *Law and the Phenomenology of Sound*

A third reason for the increased popularity of aural legal metaphors in contemporary American legal discourse has to do with the correlation between the values of developing "critical" legal theory and our understanding of the phenomenological biases of sound. Because of this correlation, many exponents of critical legal theory have found aural figures of legal speech to be convenient vehicles of ideological expression.

Critical legal theory, as primarily embraced by feminist legal scholars, critical race theorists, and a number of intellectually progressive white male jurists of various persuasions,[659] is—for all of its permutations and combinations—founded on a core group of values which set their adherents in basic opposition to traditional legal attitudes and beliefs. Most critical scholars believe that law is, or at least should be, concrete, relational, subjective, multivariate, dynamic, process-oriented, and transcendent. Law should be concrete in that judges and jurists should take greater account of situated context[660] and others' actual lived experience[661] instead of depending upon abstract or theoretical constructs.[662] It should be relational in that it should be more concerned with preventing and resolving differences by drawing people together in shared interaction and communal commitment instead of driving them apart.[663] It should be subjective to the extent that lawmakers and adjudicators should be more willing to recognize their own biases[664] while making an effort to compensate for those by empathetically adopting the points of view of the individuals who stand to be affected by their rulings.[665] It should be multivariate insofar as it should recognize the existence and legitimacy of different realities, different points of view, and different answers to the same legal question.[666] According to many critical scholars, law should be regarded as dynamic:[667] instead of being understood as a timeless entity, it should be understood as involving events in time. By the same token, it should be understood as more of a process than a system.[668] Finally, law should be transcendent in that it should reject the arbitrary limitations of traditional boundaries and categories.[669]

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[659] This last, and admittedly disparate, group would include (although it is not limited to) disciples of CLS, civic republicanism, and postmodernism.

[660] *See generally* Cover, *supra* note 449; Delgado, *supra* note 19; Michelman, *supra* note 27; Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990); Catherine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727 (1990).

[661] Matsuda, *supra* note 580, at 2324; Calmore, *supra* note 390, at 2171.

[662] For a feminist version of the attack on abstraction and "grand theory," see Fineman, *supra* note 215, at 28-29.

[663] *See* Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985); Hill, *supra* note 599; Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); West, *supra* note 609.

[664] For a description of the CLS analysis of bias which relates that analysis to an older realist critique, see David S. Caudill, *Disclosing Tilt: A Partial Defense of Critical Legal Studies and a Comparative Introduction to the Philosophy of the Law-Idea*, 72 IOWA L. REV. 287, 292-93 (1987). For a feminist analysis of the problem of bias, see Fineman, *supra* note 215, at 31.

Each one of these critical values has a counterpart in a traditionally accepted value or quality of sound, which has generally been regarded as the phenomenological—and, ultimately, epistemological—antithesis of sight.[670] Sound, for example, is assumed to be concrete. Unlike the image or the written word that we experience as an abstract, disembodied stimulus "out there," sound has an immediate physicality. Its tone, tempo, volume, and rhythm give it a complex physical texture. Sound waves literally reach out from their source to touch us; in certain circumstances—in low registers, or at high amplification—we can actually feel sound as physical vibration. Sound, moreover, imposes its concreteness on us by immersing and surrounding us in its field.[671] The resultant sense of intimate involvement is only heightened by the fact that although we can shut our eyes, withdraw from touch, and close our mouths at will, we cannot shut our ears:[672] in this context, sound makes us part of the real world whether we choose to be or not.[673] Finally, because sound is not a very effective "distance" sense, understanding and appreciating sound (or, conversely, communicating through sound) generally requires us to approach its source (or its desired object). We are thereby encouraged to experience aurality in a concrete situation. For example, aural speech "is addressed by a real, living person to another real, living person at a specific time in a real setting which includes always much more than mere words."[674]

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[665] *See* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989); Minow, *supra* note 397, at 76, 79-80; Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 52 (1988). *But see also* Massuro, *supra* note 25.

[666]
> Rather than choosing one point of view over another, courts might recognize that the existence of multiple, self-believed, plausible accounts is an important fact of the case that deserves some attention. If a dispute occurs across a perceptual fault line where people with different backgrounds, understandings and expectations have a disagreement, then the presence of different versions is a clue that there is more at stake here than the violation of a particular legal rule.

Scheppele, *supra* note 462, at 2097; *see also* Minow, *supra* note 397, at 77. CLS scholars initially broached the concept of multiperspectivity by speaking of traditional law's "indeterminacy," i.e., its inability to provide "one right answer." *See* Gabel & Kennedy, *supra* note 460; Matsuda, *supra* note 665.

[667] One feminist scholar has described this as involving a commitment to "narrativity of meaning," as opposed to "atemporality." Radin, *supra* note 605, at 1707.

[668] *See, e.g.*, White, *supra* note 23, at 688. Many feminist legal scholars sensitive to the significance of process notably describe their works as instances of "methodology" (a dynamic term that highlights process) rather than "theory" (a static term that highlights product). *See* Fineman, *supra* note 215, at 27.

[669] MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 7-11 (1990); Finley, *supra* note 21, at 899, 902; Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1771 (1990); Radin, *supra* note 605, at 1707.

[670] "Both [sound and sight], of course, are necessary in human living and are complementary. The issue here is simply that the stress on one or the other develops quite different intellectual systems." P. JOSEPH CAHILL, MENDED SPEECH: THE CRISIS OF RELIGIOUS STUDIES AND THEOLOGY 35 (1982).

Sound is also presumed to encourage relation, interaction and ultimately, community: in the words of Walter Ong, "[s]ound always tends to socialize."[675] Sound socializes because, in the first place, it is hard for anyone to ignore a sound. Sounds that we make ourselves tend to evoke responses much more successfully than most of our visible or tangible activities.[676] Perhaps others recognize that in speaking we have invested energy and effort and have revealed something intimate of ourselves that deserves acknowledgement.[677] Sounds made by others, in turn, not only surround, but actually penetrate and invade us.[678] Because sound affects us in this way, and also perhaps because we cannot turn our backs on sound, we feel the urge to respond or react. We generally experience this response as an important completion of ourselves—ignoring the aural stimulus (or being unable to respond to it) frequently leaves one with a gnawing sense of isolation. In the second place, sound socializes because its communicative dependence on physical proximity[679] draws and keeps people together.[680] It thereby facilitates mutual involvement,[681] an involvement which in some sense may be said to "suspend the self." Psychologist Julian Jaynes has expressed this point most provocatively:

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[671] Ihde, *supra* note 322, at 249.

[672] JULIAN JAYNES, THE ORIGIN OF CONSCIOUSNESS IN THE BREAKDOWN OF THE BICAMERAL MIND 96 (1976).

[673] "Sight isolates, sound incorporates." ONG, *supra* note 174, at 72.

[674] *Id.* at 101.

[675] WALTER J. ONG, RHETORIC, ROMANCE AND TECHNOLOGY 284 (1971); *see also* BROWN & GILLIGAN, *supra* note 251, at 20 ("Voice is inherently relational."); MCLUHAN, *supra* note 1, at 241 ("[T]he world of sound is essentially a unified field of instant relationships.").

[676] ONG, *supra* note 75, at 123.

[677] Lori Breslow, The Mediated "I": The Consequences of Communications Technology for the Conceptualization of the Self 39 (1989) (unpublished Ph.D dissertation, New York University) (on file with author).

[678] IHDE, *supra* note 81, at 79; *see also* LEVIN, *supra* note 538, at 32.

> Consider what it is to listen and understand someone speaking to us. In a certain sense we have to become the other person; or rather, we let him become part of us for a brief second. We suspend our own identities, after which we come back to ourselves and accept or reject what he has said.[682]

Sound tends to be regarded as a subjective sense in that an individual coming (necessarily) close to a sound is likely to evaluate it in light of the identity and character of its physical origin. This is especially true when the sound is speech. An "objective" assessment of spoken words alone is difficult. Spoken words are carried by a personal voice; they are mouthed by a personal presence from which they cannot be readily detached.[683] In such a context, objective "meaning" merges with subjective "interpretation," and objective "knowledge" merges with subjective "opinion."[684] Because of the physical closeness of most aural relationships and the resultant difficulty in achieving objectivity in such a context, persons in aural contact tend to develop more of a feeling for one another and may be better able to empathetically appreciate each other's position. Even in extreme cases, "addressing . . . and listening to one's enemy, experientially reveals that one's enemy is truly human. This understanding counteracts the strong tendency in disputes to objectify one's enemy . . . ."[685]

Sound has been considered multivariate in that it can accommodate a variety of different realities at the same time. Sound arguably accomplishes this in two ways. First, it is not as uniperspectival—i.e., as directionally selective—as sight. Recall that to see something, we have to turn ourselves towards it, and having done so, we cannot see in other directions. We can, in other words, see only one frame of "reality" at a time. When we listen, however, we can simultaneously appreciate sounds emanating from in front of us, behind, above, and below. All of these sounds from different sources are available for our attention all at once.[686] We become conscious of multiplicity. In this context, it is doubtless significant that so-called "multiperspectival art," visual art that depicts an object from several apparently contradictory perspectives simultaneously, has been repeatedly associated with cultural experiences dominated or increasingly influenced by aurality. In explaining a carving done by a member of the Tsimishian aboriginal culture of the Canadian Northwest, it has for instance been said that "what we ought to be asking ourselves is how the artist's hand might have been guided by the multidirectional world of the ear rather than the unidirectional world of the eye, given that [the artist's] culture is an oral-aural one."[687] Modern multiperspectival "cubism" has likewise been described as "one of the painterly forms of acoustic space."[688] Second, sound may be considered multivariate insofar as different sounds can be simultaneously combined in the same space without suppressing their component parts. Thus it has been noted that "music is not like vision."[689] Unlike visual colors,[690] musical tones "may be combined without losing their individuality. What you end up with is a chord, something new, which has its own sound but in which the individual tones are also distinct and identifiable. It's not a blending . . . but something of a different order."[691] Harmony and choral "polyphony" depend on such a mixing. In this way as well, the sense of sound may be more tolerant and even celebratory of difference than is the sense of sight.

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[679]
> The area that the unaided ear can effectively cover in the course of daily living is quite limited. Up to twenty feet the ear is very efficient. At about one hundred feet, one-way vocal communication is possible, at somewhat slower rate than at conversational distances, while two-way conversation is very considerably altered. Beyond this distance, the auditory cues with which man works begin to break down rapidly.

HALL, *supra* note 370, at 41.

[680] DAVID REISMAN, THE ORAL TRADITION, THE WRITTEN WORD, AND THE SCREEN IMAGE 34 (1956).

[681] "[L]istening, . . . unlike sight, involves a turning toward the Other. An epistemology of listening compels us towards dialogue rather than detachment." O'Fallon & Ryan, *supra* note 22, at 896-97.

[682] JAYNES, *supra* note 672, at 97.

[683] On the relationship between sound and presence, see ONG, *supra* note 75, at 114.

[684] *See generally* David R. Olson, *The Cognitive Consequences of Literacy*, 27 CANADIAN PSYCHOL. 109 (1986).

[685] Lipkin, *supra* note 453, at 109.

We also understand sound as dynamic: "Sound dances timefully within experience. Sound embodies the sense of time."[692] A sounded musical note or a spoken word is not a fixed object, but an event. It exists only to go out of existence. Sound, moreover, discloses an event: it is the product of a "doing" of some sort, be that someone walking, a river running, rain falling, or a machine working.[693] It is a disclosure that may itself take time; while sight is apparently instantaneous, sound is relatively slow (witness the phenomenon of "echo").[694] Both Plato and Aristotle considered sound uniquely time-bound because of its delay in spreading over a distance.[695] In this context, a hearing-oriented world is a world necessarily focused on the ideas of "duration" and "becoming."

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[686] ONG, *supra* note 75, at 129.

[687] David Howes & Constance Classen, *Sounding Sensory Profiles*, *in* VARIETIES, *supra* note 48, at 257, 265.

[688] MARSHALL MCLUHAN & ERIC MCLUHAN, LAWS OF MEDIA: THE NEW SCIENCE 55 (1988).

[689] ACKERMAN, *supra* note 166, at 219.

[690] *See supra* note 375 and accompanying text.

[691] ACKERMAN, *supra* note 166, at 219-20.

[692] IHDE, *supra* note 81, at 84.

Because sound is both an event in time, and is based on an event in time, it is said to favor the idea of process rather than the idea of system. It is uniquely suited to the understanding and communication of events following one another. Literary critic Northrop Frye realized this when he concluded that while systematic patterns of meaning were in the domain of the eye, narrative was in the domain of the ear (consider, for instance, how much less compelling is a visualized narrative—in a book or a graph—compared to an aurally told tale where one cannot skip to the conclusion or readily go back to the beginning).[696] In the context of a similar understanding, feminist philosopher of science Evelyn Fox Keller has commented that "[k]nowledge likened to the sense of hearing . . . might well lend itself more readily to a process view of reality."[697]

Finally, we frequently consider sound to be transcendent. As we have already seen, vision enables us to recognize sharp distinctions and boundaries: the dividing line is a classic visual construct. Sound, by contrast, is poorly suited to the task of delimitation. "Auditory space," we are told, "[is] a sphere without fixed boundaries, space made by the thing itself, not space containing the thing."[698] Because sound floating on the air lacks the precision of the line set on the page, aural differentiations are more often experienced as differentiations of degree rather than of kind. It is easier to distinguish between high and low volume of a given sound than it is to distinguish, at the edge of aural experience, between sound and silence. In this context, sound creates an arena of mutual involvement instead of a division of experience.

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[693] JONAS, *supra* note 108, at 137; ONG, *supra* note 75, at 112.

[694] In this context, "[w]hat . . . sound immediately discloses is not an object but a dynamical event at the locus of the object, and thereby mediately the state the object is in at the moment of that occurrence." JONAS, *supra* note 108, at 137.

[695] CHIDESTER, *supra* note 368, at 7.

[696] See the discussion of Frye, *id.* at 12.

[697] Keller & Grontworski, *supra* note 87, at 221.

[698] Carpenter & McLuhan, *supra* note 45, at 67.

In a previous section of this Article, I argued that the correlation between traditional legal theory and the values of vision may be ascribed to the cultural context in which American law has grown up, to the sensory biases of the groups that have dominated American law to this point, and to the medium used to express and develop traditional American legal theory. The apparent correlation between critical legal theory and the values of sound may be explained in somewhat similar fashion. First of all, critical legal theory has grown up in a more contemporary, and hence, more aurally oriented cultural environment;[699] in this situation, critical theory has arguably, if unwittingly, absorbed values and biases that sound is spreading through American culture as a whole. Second, critical legal theory has been significantly shaped by individuals coming from American gender, racial, ethnic, and religious groups which, relative to others, have had more respect for aural expression and experience. The relative aurality of these groups has arguably disposed their members towards values which sound presumably favors. Given the inclination and opportunity, a growing number of these individuals are now applying the same values to American legal thought. For instance, the relative aurality of American women may be largely responsible for their traditional, if hardly exclusive[700] or essential,[701] association with the concrete and contextual, the relational, the subjective, and the process-based.[702] Feminist legal scholars seeking to draw on women's lived experience have certainly played a key role in making these values an integral part of critical jurisprudence.[703] The relative aurality of African American culture (although again neither exclusive nor essential) has arguably done much to attract African Americans to similar ideals;[704] a number of African American legal scholars are now incorporating these into their own brand of critical writing.[705] The aurality of Jewish religious experience may equally have encouraged Jews to emphasize context, relation, subjectivity, multivariance, and dynamism in their tradition,[706] emphases that are becoming newly evident in the critical works of many Jewish American legal scholars.[707] Third, sound has been brought directly to bear on the development of critical theory insofar as much of that theory has been conceived and elaborated not in writing, but in the aural argument, debate, and discussion of scholarly conferences, seminars, and symposia.[708] If, indeed "the medium is the

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[699] *See supra* notes 401-69 and accompanying text.

[700] *See, e.g.*, Friedell, *supra* note 587, at 944-49 (discussing the similarity between "feminist" values and traditional Jewish legal values); Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135 (1990) (emphasizing the correspondence between contemporary feminist values and the values embraced by medieval men); Sherry, *supra* note 387 (pointing out that "feminist" or "feminine" values have much in common with "republican" values that were articulated by seventeenth- and eighteenth-century English and American males); and Williams, *supra* note 388 (noting the overlap between "women's" values and the values articulated by some of the twentieth century's most culturally and intellectually progressive men). It is extremely interesting to note that all of the male groups with which feminists seem to share a common normative ground have lived in cultural environments significantly infused or re-infused with aurality.

[701] Williams, *supra* note 388, at 806 (disputing—in light of their nonexclusivity—the notion that any values can be labelled essentially "feminine" or "feminist" per se).

[702] *See generally* BELENKY ET AL., *supra* note 251, at 93-99, 149; NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978); GILLIGAN, *supra* note 255; JEAN B. MILLER, TOWARD A NEW PSYCHOLOGY OF WOMEN (1976); ANNE W. SCHAEF, WOMEN'S REALITY: AN EMERGING FEMALE SYSTEM IN THE WHITE MALE SOCIETY (1981); Bate, *supra* note 241, at 303-05; Bonnie J. Dow & Mari

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B. Tonn, *"Feminine Style" and Political Judgment in the Rhetoric of Ann Richards*, 79 Q. J. SPEECH 286 (1993); Patricia A. Sullivan, *Women's Discourse and Political Communication: A Case Study of Congressperson Patricia Schroeder*, 57 W. J. COMM. 530 (1993).

[703] *See, e.g.*, Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion and Wisdom*, 77 CAL. L. REV. 1011 (1989); Christina A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1980); Elizabeth M. Schneider et al., *"Feminist Jurisprudence"—The 1990 Myra Bradwell Day Panel*, 1 COLUM. J. GENDER & L. 5, 11-13 (1991); West, *supra* note 663; and the works of other feminist legal scholars cited *supra* notes 659-69.

[704] For example, on the importance of subjective commitment and personal perspective in African American culture, see KOCHMAN, *supra* note 287, at 20-25; Henry L. Gates, Jr., *Introduction* to BEARING WITNESS: SELECTIONS FROM AFRICAN-AMERICAN AUTOBIOGRAPHY IN THE TWENTIETH CENTURY 3 (Henry L. Gates, Jr. ed. 1991). In a recent law review article, Charles Lawrence indirectly suggested a personal connection between aurality and subjectivity in these terms:

> I feel an immediate kinship with the tradition that [African American historian Vincent] Harding describes and names "the Word." It is a tradition of teaching, preaching, and healing . . . .
>
> . . . .
>
> By contrast I am struck by the strong sense of alienation that I have felt from the role of "scholar" . . . . I sense that the primary source of my resistance to this role lies in the question as to whether the character of this tradition is in direct opposition to that of the Word. The scholar is "objective." . . . He is guided by an orthodoxy that equates objectivity with emotional disengagement, cognitive distance, and moral indifference.

Lawrence, *supra* note 390, at 2238 (footnote omitted). Lawrence goes on to discuss African Americans' cultural concern with personal perspective and subjectivity. *Id.*

[705] *See, e.g.*, WILLIAMS, *supra* note 613; Calmore, *supra* note 390; Culp, *supra* note 390; Lawrence, *supra* note 390.

[706] *See generally* BOMAN, *supra* note 85; Friedell, *supra* note 587.

[707] *See, e.g.*, Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685 (1991); Cover, *supra* note 449; Cover *supra* note 649; Fletcher, *supra* note 24; Jacobson, *supra* note 326.

[708] Note, for instance, the jurisprudential impact of the Conference on Critical Legal Studies, first held in 1977 and later reconvened annually; the annual Feminism and Legal

message" (or at least part of it), critical legal theory may be said to have both literally and figuratively echoed the circumstances of its birth and development. Taking this point together with the others, it would seem that the overlap between critical legal ideology and aural phenomenology is not at all coincidental.

The apparent compatibility of critical legal ideology and aural phenomenology has had at least two significant consequences for contemporary American legal scholarship. To begin, it has played a supporting role in encouraging critical legal scholars to experiment with scholarly formats which indirectly and directly draw on aural experience. Setting ideas in story or poetry evokes, if not necessarily duplicates, phenomenological circumstances that may indirectly reinforce the critical concepts or values (concreteness, relation, subjectivity, process, etc.) which are being explicitly articulated.[709] Perhaps this is another reason why these and other related forms are "powerful means for destroying [the existing] mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place."[710]

The same apparent compatibility of ideology and phenomenology has drawn many exponents of critical legal theory to aural legal metaphors. The concrete, subjective nature of law is handily captured by the terms "voice" and "story." The idea of law both as relation and process is neatly communicated by the terms "listen-

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Theory Conferences run by Martha Fineman; the Conference on Critical Race Theory, 1989; and a variety of other "critical" gatherings mentioned in Coombs, *supra* note 586, at 692. On the intersection of aural and visual, oral and written in this type of environment, see generally Deborah Tannen, ***The Commingling of Orality and Literacy in Giving a Paper at a Scholarly Conference***, 63 AM. SPEECH 34 (1988).

[709] Thus, "feminist legal writers who have written about particular injuries increasingly include some version of the narrative [i.e., the story] of their own victimization. We do this, I think, because of our conviction that these narratives are *essential* to the substantive analysis we are trying to convey." West, *supra* note 609, at 107 (footnotes omitted).

[710] Delgado, *supra* note 25, at 2413. Using actual sound (speech or song) to communicate or insinuate critical concepts or values is even more ideologically provocative. As Gary Minda has observed in the context of music:

> knowing the words, singing along and having your body rhythmically in tune with the music can create an experience which goes beyond the abstract, analytical descriptions of what the song . . . can mean when considered alone on a printed page. The intersubjective feelings evoked by listening to the music . . . can be a way for experiencing *counterculture*—an experience of social relations which is different from the everyday experiences captured by one's "professional" life as a lawyer, law student or law professor.

Minda, *supra* note 454, at 490 (footnote omitted). Over the last twenty years, a number of law professors—Paul Wohlmuth at San Diego, Karl Johnson and Ann Scales at New Mexico, and John Calmore at Loyola—have played music and sung songs in the classroom for precisely this reason.

ing," "dialogue," and "conversation."[711] "Polyphony" telegraphs the multivariate character—literally, the many-voicedness[712]—of law. By choosing these and other aurally inspired terms,[713] critical legal scholars have indirectly but effectively challenged the traditional legal understandings that have so often been supported and even rooted in visual legal language.[714] This aural language is arguably so powerful, however, that mere casual usage may have the same "subversive" result: an innocent tendency to describe law as "talk" may, for instance, indirectly support and even encourage the notion that law is concrete, dynamic, and subjective. In this sense aural legal metaphors—like aurally evocative forms of legal scholarship—may themselves be profoundly "counter-hegemonic."

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[711] "The metaphor[ ] . . . of . . . conversation enable[s] a conception of community connections forged through the exchange of words in the struggle for meaning." Minow, *supra* note 20, at 1881. In the discipline of psychology, Lyn Mikel Brown and Carol Gilligan have analogously written:

> Our effort to find ways of speaking about human experience in a manner that re-sounds its relational nature . . . as well as the ever-changing or moving-through-time quality of the sense of self and the experience of relationship, has led us to shift the metaphoric language psychologists traditionally have used in speaking of change and development from an atomistic, positional, architectural, and highly visual language of structures, steps, and stages to a more . . . musical [i.e., aural] language of movement and feeling . . . .

BROWN & GILLIGAN, *supra* note 251, at 23.

[712] The terms "polyphony" and "polyphonic" "are applied to 'many-sound' or 'many-voiced' music, i.e., music in which instead of the parts marching in step with one another, . . . they move in apparent independence and freedom though fitting together harmonically." PERCY A. SCHOLES, THE OXFORD COMPANION TO MUSIC 820 (John O. Ward ed., 10th ed. 1970).

[713] For a rare instance of legal scholars deliberating at length on the theoretical appropriateness and utility of an aural metaphor ("listening"), see O'Fallon & Ryan, *supra* note 22.

[714] Thus, "feminist and minority legal scholars have used voices and story-telling as metaphors to argue for a jurisprudence grounded in the reality of personal and social experience." Martha I. Morgan, *Founding Mothers: Women's Voices and Stories in the 1987 Nicaraguan Constitution*, 70 B.U. L. REV. 1, 3 (1990). On the normative (as opposed to the sociological) attraction of aural metaphors for feminists generally, see Love, *supra* note 255, at 95:

> In their efforts to avoid the trio distance/domination/normalization, feminist epistemologists mix metaphors, opening vision up to, imbricating it with, voice(s). The sound of voices draws them away from the epistemological terrain of the foundationalist/antifoundationalist debate. They move toward politics, towards the extra-foundational space that debate reveals. However, the continued dominance of visual imagery, the association of knowing with seeing, obscures and slows that movement. An exploration of differences between these senses suggests that voice is a better metaphor for a political epistemology and the democratic politics accompanying it.

Both these comments may profitably be compared with the metaphoric strategy adopted earlier in this century by "critical" Continental philosophers such as Martin Heidegger: "Ocular metaphors presuppose distance and detachment, and Heidegger is constantly replaying them in aural terms which stress the *belonging* of Dasein to Being. . . . Ocular metaphors give way to aural ones in order to regain our sense of the primordial belonging of thought to Being, of man to world." Caputo, *supra* note 505, at 255.

CONCLUSION: LAW RE-VIEWED

I began this Article with the proposition that the growing recourse to aural as opposed to visual metaphors as a means of communicating legal ideas represents a significant—if nascent—reconfiguration of American legal discourse. After devoting Part I of the Article to emphasizing the importance of metaphors as both consequences and causes of cultural and legal change, I argued in Part II that the traditional prominence of visual metaphors in American jurisprudence has been a product of three factors: first, the traditional, largely writing-induced visuality of American culture as a whole; second, the historical domination of the American legal community by members of American gender, racial, ethnic, and religious groups which have been more writing-dependent and hence more respectful of visual expression and experience; and third, the perceived "fit" between the values of traditional legal theory and the values said to be supported by visual phenomenology. In Part III of the Article, I suggested that there are three complementary reasons for the turn towards aural legal metaphors which has recently become so evident in the academy, if not yet in the profession. First, under the impetus of new communications technologies, American culture as a whole is turning away from its traditional visual bias and is becoming much more aurally oriented. Second, a growing number of American law professors from formerly marginalized, relatively less writing-dependent, and therefore more aurally oriented gender, racial, ethnic, and religious groups are increasingly willing, able, and even eager to plumb their own experiences—and, in the process, their aural traditions—for scholarly inspiration. Third, there appears to be a significant and convenient overlap between the substantive values embraced by exponents of critical legal theory and the values we perceive to be encouraged by sound.

If American legal language is being reconfigured today, however, what is to prevent it from being transformed tomorrow? Why should the incipient trend I have here identified and discussed not continue to the point where, in the future, the domination of aural legal metaphors becomes as overwhelming as the domination of visual legal metaphors was yesterday?

Here, one might offer several answers. First, it may be argued that insofar as legal metaphors are shaped by circumstance, neither

American culture nor American law will probably be able to sustain a complete or near-complete transition to aurally based legal language.[715] Aural technology may have surged in the last century or so, but as I have repeatedly noted in this Article, visual technology has hardly stood still for it. The same age which has given us the telephone, the radio, and the tape recorder has also given us inexpensive photography, motion pictures, television, and the computer. The last three of these "visual" technologies have actually joined sound to sight, promoting a trend towards sensory synthesis that has culminated in today's "multimedia" technology. In this new environment, American culture is likely to embrace both sight and sound rather than encourage a definitive turn from one sense to the other. By the same token, it is not likely to generate or support a legal discourse that would consistently prefer aural over visual metaphors. The likelihood of metaphoric transformation is decreased even further by the certainty that the composition of the American legal academy (not to mention the American legal profession) will in the foreseeable future remain mixed along a variety of gender, racial, ethnic, and religious lines, thereby ensuring the continued participation in American legal discourse of individuals coming from a variety of relatively more visual and relatively more aural traditions. Insofar as individuals of all backgrounds remain willing and able to draw consciously or subconsciously on their own historical experiences for intellectual inspiration, it is likely that some will continue to favor visual legal metaphors, while others will turn to aural legal language. Diversity will allow for difference.

Apart from what is likely to happen, one might argue that a complete shift from visual to aural figures of legal speech in American legal discourse would be inadvisable, even for those persons who have thus far gained or been empowered by the increased popularity of aural legal metaphors. In the guise of liberating and validating the relatively more aural experiences of individuals from traditionally marginalized American gender, racial, ethnic, and religious groups, such a transformation might ironically do much to legitimate and validate the circumstances of their marginalization. For instance, when feminist legal scholars embrace aural metaphors such as "dialogue" and "conversation," are they not coining a legal language in large part born of the very conditions of subordination and oppression that they seek to challenge and change? Do not their words—for all their obvious appeal—at some level accept and endorse the sensory limitations that others (in this instance, men) have traditionally imposed on them?[716] In this context, the true liberation of individuals from marginalized backgrounds arguably requires that they not arbitrarily limit themselves to—or preemptively define themselves by—aural metaphors that others have in some sense chosen for them.[717]

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[715] To this extent I would disagree with Richard Rorty, who has argued that "[a] historical epoch dominated by Greek ocular metaphors may, I suggest, yield to one in which the philosophical vocabulary incorporating these metaphors seems as quaint as the animistic vocabulary of pre-classical times." RORTY, *supra* note 536, at 11.

Undue reliance on aural metaphors might even distance outsider legal theorists from other important aspects of their own cultural histories and experiences. No human culture—however constituted—is ever completely visual or aural, and we all run the risk of misunderstanding and distorting ourselves if we try to redefine the world—or law—along a single sensory line. Here, the historical experience of male, white, Anglo, and Protestant Americans may serve as both a lesson and a warning: in allowing themselves to have been drawn so strongly to visuality, many individuals from these backgrounds have largely forgotten or failed to appreciate the not-insignificant degrees of aurality inherent in their own traditions—an aurality which they are only now rediscovering in an increasingly aural age. Their extreme indulgence of the visual has thus come at a critical cost not only to others, but to themselves.

A complete shift from visual to aural legal metaphors is moreover unnecessary, even to accomplish or propel the value changes that exponents of critical legal theory in particular may desire. It is true that we have traditionally regarded the values associated with sound as more compatible with critical legal theory than the values associated with sight. This would seem to suggest that visual legal metaphors are almost by definition inadequately expressive of critical ideas and therefore deserve rejection by critical theorists. One must wonder, however, whether the perceived shortcomings of visual legal metaphors are due to some inherent "essence" of visuality or whether they are simply a function of how we have traditionally understood sight. Perhaps sight does not have a phenomenological essence.[718] Perhaps it embraces a multiplicity of contradictory values—values which are brought out by different visual media. For instance, perhaps it is our dependence on the visual medium of writing that encourages us (although it certainly does not force us) to believe that sight abstracts, disengages, and objectifies. Writing tends to cut us off from the physical world; traditionally conceived, it facilitates the separation and mutual noninvolvement of writer and reader, and it enables the reader to assess visual information without being burdened by the presence and personality of the writer. But what if—perhaps under the impetus of television, film, and video technology—one were to understand sight more through the lens, say, of gesture?[719] In those circumstances, might not "sight" be considered to favor dynamism, multivariance, relation, and subjectivism?[720] Would not a focus on gesture give vision a meaning in time? Would not the visual perception and interpretation of movement facilitate the recognition of multiple "truths"?[721] Would not its personalized energy and power invite reciprocation?[722] Would it not facilitate the association of message and messenger?[723] If these things are so, then perhaps sight and, by implication, visual legal metaphors, are in the abstract potentially compatible with critical theory.

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[716] *See generally* CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, *in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 39 (1987) ("I am critical of affirming what we have been, which necessarily is what we have been permitted, as if it is women's, ours, possessive.").

[717] For a discussion of the importance of "reclaiming the visual" in feminism in particular, see Ellen L. Fox, *Seeing Through Women's Eyes: The Role of Vision in Women's Moral Theory*, *in* EXPLORATIONS IN FEMINIST ETHICS: THEORY AND PRACTICE 111 (Eve B. Cole & Susan Coultrop-McQuin eds., 1992); Diane Shoos, *The Female Subject of Popular Culture*, 7 HYPATIA 215 (1992); *see also* Donna Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, 14 FEMINIST STUD. 575, 582 (1988) ("I want a feminist writing of the body that metaphorically emphasizes vision again, because we need to reclaim that sense to find our way through all the visualizing tricks and powers of modern sciences and technologies that have transformed the objectivity debates.").

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[718] *See generally* DON IHDE, TECHNICS AND PRAXIS 82-92 (1979); MARTIN JAY, FORCE FIELDS: BETWEEN INTELLECTUAL HISTORY AND CULTURAL CRITIQUE 102-04 (1993); Neil Evernden, *Seeing and Being Seen: A Response to Susan Sontag's Essays on Photography*, 68 SOUNDINGS 72 (1985); Stephen Houlgate, *Vision, Reflection and Openness: The Hegemony of Vision from a Hegelian Point of View*, *in* MODERNITY, *supra* note 75, at 8. In the legal literature, see ROSE, *supra* note 64, at 273.

[719] On the modern TV- and film-inspired resurgence of gesture as a, and even *the*, visual medium, see Edmund Carpenter, *The New Languages*, *in* EXPLORATIONS IN COMMUNICATION, *supra* note 45, at 162, 170-71. For a brief discussion of the phenomenological qualities of gesture (comparing those with the qualities traditionally associated with sound), see ONG, *supra* note 75, at 147.

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> If television is ocularcentric—and in many ways it is—it nevertheless revisions the eye. The eye of ego consciousness, the eye of the reader of the book, arises within a cultural-historical moment in which the ego as disembodied spectator is invited to keep his or her eye, singular, fixed, and distant, upon the world. . . . The television eye, the ocularcentrism of the television experience, is of a quite different sort. . . . [T]he eye of television consciousness is re-minded of the body. Seduced by images, a seduction which is to be sure not without its problems, the eye of the television body is an emotional vision, a vision that is moved at a body level.

Romanyshyn, *supra* note 75, at 341.

[721] As it arguably did in Marcel Duchamp's painting *Nude Descending a Staircase* and Giacomo Bella's *Dog on a Leash*.

[722] Thus, the frequently experienced temptation to "exchange" gestures with an obnoxious or vulgar fellow-motorist . . . .

By the same token, a total embrace of aural legal metaphor might not be sufficient to the purpose of promoting the aims of critical legal theory. Perhaps sound too is ultimately without a phenomenological essence, regardless of the values that we currently associate with it. For instance, we regard sound as concrete, relational, subjective, and dynamic, but we may do so because we still envisage ourselves experiencing sound in the context of face-to-face encounters. What would happen, however, if we ceased thinking of sound in this traditional fashion, and under the influence of ongoing technological change began to view it (as we are increasingly coming to experience it) as a product of technology—a product of the radio, the television, the telephone, the tape recorder, and the computer.[724] It could be argued that this technologically based sound could easily embrace and implicitly support values very different from those that we have hitherto associated with the aural.[725] For instance, relative to face-to-face conversation, technologically based discourse radically distances and decontextualizes those who are party to it. Insofar as it can be unyielding, technological sound can cut off or preempt interaction rather than facilitate it.[726] In the same vein, technological sound is not necessarily subjectifying: indeed, the power of its electronic amplification can make it brutally objectifying.[727] Finally, instead of being dynamic, technological sound can be static—something that can be frozen in time, manipulated, and transferred for replay. In this context, prominent aural legal metaphors such as "voice," "speaking," and "listening" (and even "dialogue" and "conversation") that now seem unequivocally positive and supportive of the critical agenda may prove capable of evoking ambivalent or even negative values which would be fatal to their critical purpose. Arbitrarily limiting ourselves to aural figures of legal speech would therefore be as inadvisable as rejecting visual legal metaphors out of hand.

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[723] A phenomenologically compatible alternative to reconceiving vision in terms of gesture could involve reconceiving the act of seeing itself as an active mutual "glance" instead of a fixed, passive "gaze." For an extended discussion of the idea of the "glance" and its distinct phenomenological implications, see Deena Weinstein & Michael Weinstein, *On the Visual Constitution of Society: The Contributions of Georg Simmel and Jean-Paul Sartre to a Sociology of the Senses*, 5 HIST. EUR. IDEAS 349 (1984). On movies and television (with their hard cuts and constant perspective shifts) as promoters of a visual experience made up of discrete glances, as opposed to a fixed view or gaze, see Tyrwhitt, *supra* note 374, at 95.

[724] "[T]he spoken word, the new orality, must face up to the technical apparatuses that support it and diffuse it with a rare efficiency, but at the same time condition and coopt it . . . ." FRANCO FERRAROTTI, THE END OF CONVERSATION: THE IMPACT OF MASS MEDIA ON MODERN SOCIETY 39 (1988).

[725] *See generally* Raymond Gozzi, Jr. & W. Lance Haynes, *Electric Media and Electric Epistemology: Empathy at a Distance*, 9 CRITICAL STUD. IN MASS COMM. 217 (1992); Dyson, *supra* note 505, at 95-117.

[726] Thus, the loudspeaker or the incessant voice of the radio, both of which have historically been associated with the power of dictatorial regimes. On the use of these aural instrumentalities in Nazi Germany, the Soviet Union, and Eastern Europe, see SCHAFER, *supra* note 474, at 91-92. In a more contemporary context Schafer has observed that "the intense amplification of popular music does not stimulate sociability so much as it expresses the desire to experience individuation . . . aloneness . . . disengagement." *Id.* at 96; *see also* ACKERMAN, *supra* note 166, at 187.

It seems that into the foreseeable future, American legal discourse will—and, to avoid being painted into a cultural, sociological, or phenomenological corner, probably should—continue to embrace metaphors evoking sight as well as metaphors evoking sound. While we listen with new attention to the "voice" and "conversation" of the law, we can still "observe" and "review" it. In the long run, such an inclusive and potentially synergistic reconfiguration of American legal discourse will help to ensure that, in a new era, American law remains figuratively and literally sensible.

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> [A]ural perception and oral expression neither presuppose nor guarantee a more 'personal' idea or use of knowledge. That the spoken word . . . lends itself less easily to apersonal forms of fixation and transmission than images or print, can no longer be taken as a truism. New techniques available to record (and process) spoken language . . . make the old divisions harder to maintain . . . .

JOHANNES FABIAN, TIME AND THE OTHER: HOW ANTHROPOLOGY MAKES ITS OBJECT 119 (1983).